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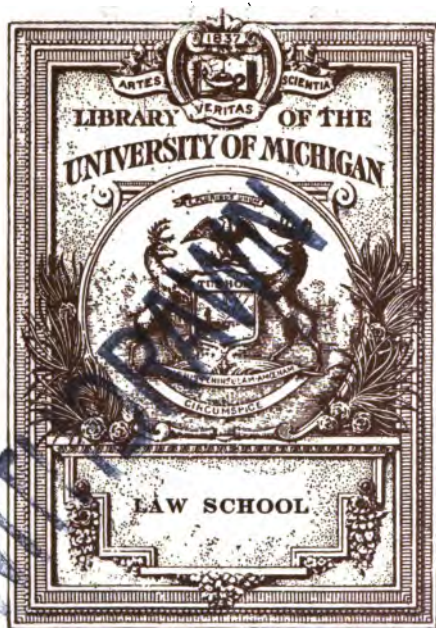
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*Davidson Black*  
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THE INSTITUTES

OF

ENGLISH PUBLIC LAW:

EMBRACING AN OUTLINE OF

*3284*

GENERAL JURISPRUDENCE;

THE DEVELOPMENT OF THE BRITISH CONSTITUTION;

PUBLIC INTERNATIONAL LAW;

AND THE

PUBLIC MUNICIPAL LAW OF ENGLAND.

*70794*

BY

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LONDON:

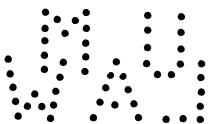
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11-25-29 Case

TO

THE RIGHT HONORABLE

SIR WILLIAM BOVILL, KNT., D.C.L.,

LORD CHIEF JUSTICE OF HER MAJESTY'S COURT OF COMMON PLEAS,

*This Work*

IS (BY PERMISSION)

RESPECTFULLY DEDICATED

BY

THE AUTHOR.



## PREFACE.

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THE aim of this work is to give to the reader as succinct and clear a view as possible of the relation in which the State and the English citizen are placed by our Constitutional and Municipal Law relatively to each other. In the first Chapter, therefore, I have endeavoured to explain the philosophy of political union ; in the second, to point out the legal principles common to all systems ; in the third, to trace the development of our Constitution, and to show the relation now existing between the Crown, the Lords, and the Commons ; in the fourth, to explain the relation of our own to other Sovereign States ; and in the fifth Chapter, to indicate the various measures that have been adopted, to secure the safety and prosperity of the State regarded as an individual, and of each individual regarded as a member of the State. These several subjects constitute together what may be termed Public Law, as distinguished from Private Law. By Private Law I mean those rules by which citizens are governed in their

private business and social intercourse with each other.

In order to explain the exact scope of this outline, it may not be out of place here to say that every legal system is divisible into three branches—the Public Law, the Private Law, and the Adjective Law. The province of each of these branches is defined at page 90. It is with the public branch only of our system that this work is concerned, except in so far as the matter of Private and Adjective Law has been treated of in the first two Chapters. These Chapters are intended to give that general information concerning Law as a Science, without which it is impossible for the reader to appreciate the characteristic features of any particular system.

DAVID NASMITH.

4, GARDEN COURT, TEMPLE;  
*December, 1872.*

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## TABULAR ANALYSIS.



**TABLE I.**

**GENERAL OUTLINE OF THE MATTER OF JURISPRUDENCE.**

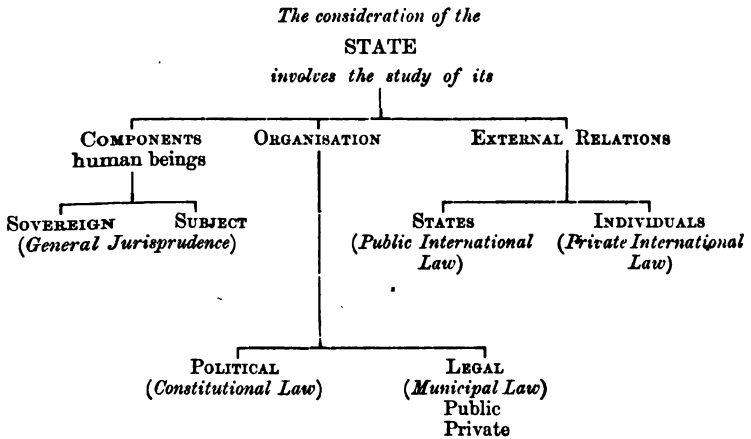
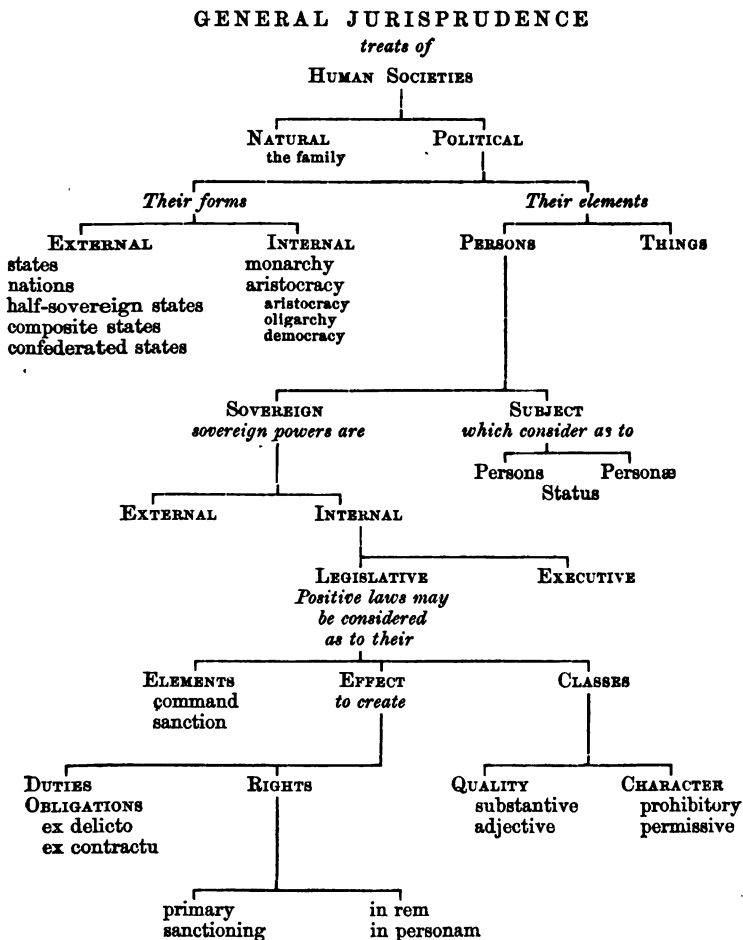


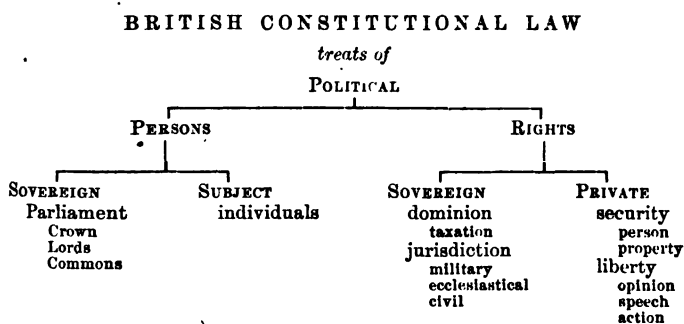


TABLE II.





**TABLE III.**



The Chapter upon this subject is entitled 'The Development of the British Constitution.' It has been treated historically, rather than analytically, in order to show the various stages in our history, and the steps by which our Constitution has arrived at its present condition.



TABLE IV.

PUBLIC INTERNATIONAL LAW

*may be considered as to its*

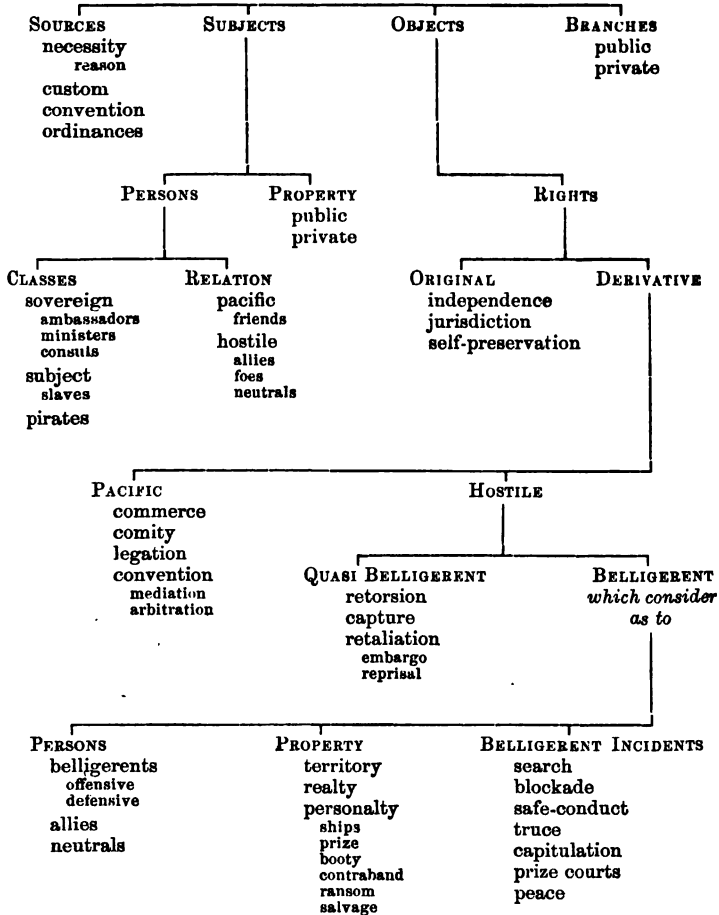
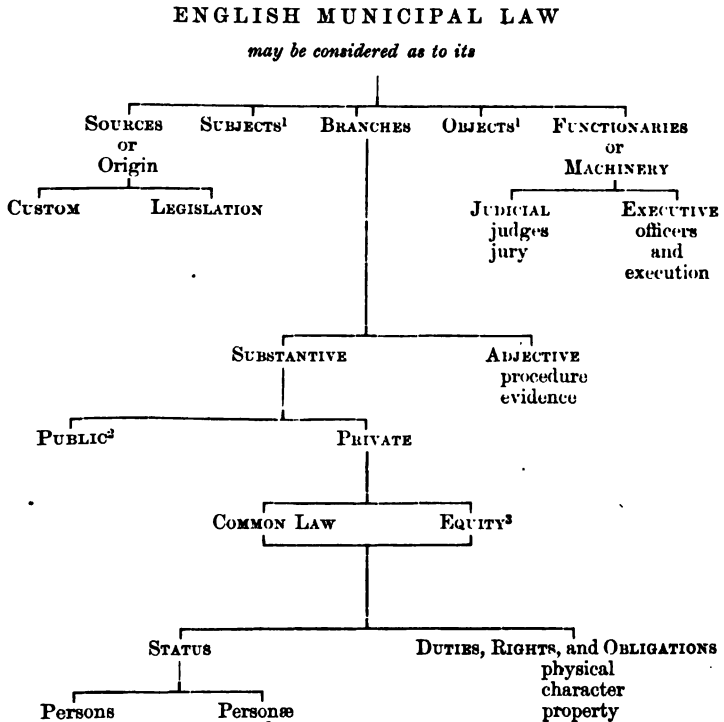




TABLE V.



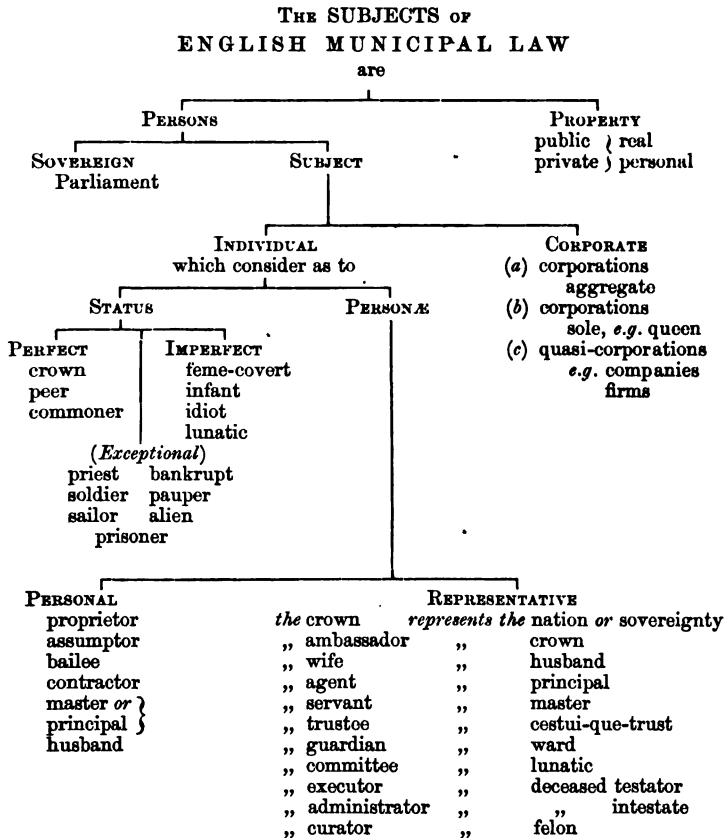
<sup>1</sup> See Tables VI. and VII.

<sup>2</sup> See Table VII.

<sup>3</sup> In its technical sense, signifying the law administered by the Court of Chancery.



TABLE VI.



The discussion of the contents of this Table belongs almost entirely to a work on English Private Law (Chapter 'Persons').



**TABLE VII.**

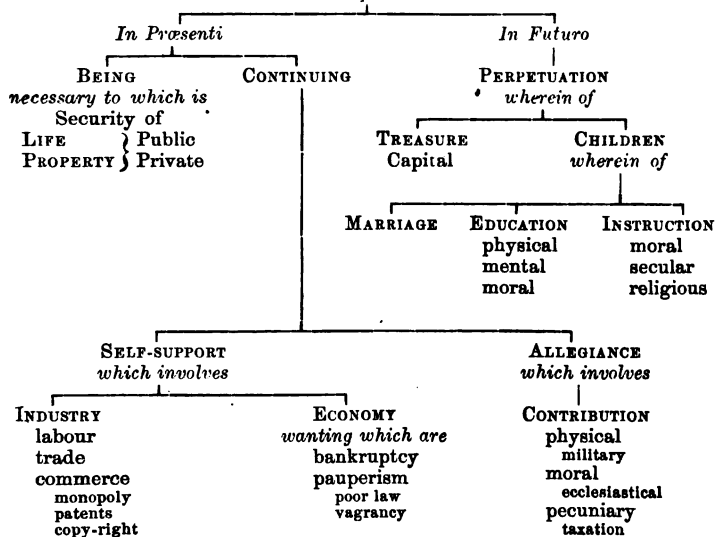
**THE OBJECTS OF  
ENGLISH PUBLIC MUNICIPAL LAW**

are the  
**DUTIES and RIGHTS**  
imposed and conferred to ensure to the State  
and to its individual members

**HAPPINESS**

*that is*  
**PEACE and PLENTY (Present and Future)**

*which duties and rights  
respect*





# INSTITUTES OF ENGLISH LAW.

---

## CHAPTER I.

### ORIGIN OF LAW.

Ideas, their source and means of communication—Man a social being—Happiness—Causes which regulate human conduct—Various kinds of Law—Good and evil—The two schools of Moral Theology—Two schools of the index to the unwritten Divine will;—the theory of a Moral sense, and that of Utility—Theories as to the origin of Law—Jurisprudence—Positive Morality—Objects metaphorically termed Laws—The Science of Legislation—Ethics—Justice and Injustice.

‘THE meanest and most obvious things,’ says Locke, ‘that come in our way, have dark sides, that the quickest sight cannot penetrate into. The clearest and most enlarged understandings of thinking men, find themselves puzzled, and at a loss, in every particle of matter. We shall the less wonder to find it so, when we consider the causes of our ignorance, which, I suppose, will be found to be these three:—First, want of ideas; secondly, want of a discoverable connexion between the ideas we have; thirdly, want of tracing and examining our ideas.’

‘Let us suppose the mind to be, as we say, white paper, void of all characters, without any ideas; how comes it

<sup>1</sup> Human Understanding, Book iv., ch. 3, § 22.

to be furnished? Whence comes it by that vast store which the busy and boundless fancy of man has painted on it, with an almost endless variety? Whence has it all the materials of reason and knowledge? To this I answer in one word, from experience; in that all our knowledge is founded; and from that it ultimately derives itself.<sup>1</sup>

Is it foolish to ask the question, What is experience? To enquire the manner in which impressions are derived, notions formed, ideas acquired? I think not. To the thoughtful, *effect* is the isolated fact; *cause* the fruitful source, the fountain head.

Man is a sentient being. Through one or more of the organs of sight, touch, hearing, smell, and taste, he is brought into contact with external objects, and thus acquires the notions he possesses concerning them. He has the power of remembering, or retaining in his recollection, the notions or ideas thus formed; he can recall them, more or less perfectly, at will; he can compare one with another, and by comparing and combining he can create new forms of mental imagery.

But as each idea depends upon the sense that is affected by the external object, whatever that may be, it is obvious that, if the sense is defective, the impression must be imperfect, and the idea consequently erroneous. Universal experience teaches us that no two individuals are exactly alike, and that in no individual are all the senses equal or uniformly developed. From which we infer that no two individuals have, or can have, precisely the same ideas concerning the same thing; hence the *diversity of opinion*, and *desire*; hence the possibility of human society, which, it may be presumed, would be impossible, had all men the same ideas

<sup>1</sup> Human Understanding, Bk. ii. ch. 1, § 2.

and the same desires ; hence also the impossibility of so organizing society as to give in all respects perfect satisfaction to any individual ; and hence, finally, the problem that has to be solved by the legislator and the jurist.

If the same thing produces upon different individuals different impressions—and that such is the case, cannot be doubted—we at once see the importance and the imperfection of language ; the extreme difficulty, first, of expressing in words, to our own satisfaction, our thoughts or ideas ; and, secondly, of so expressing them as to convey to the mind of the listener that which we intend. Without further elaborating this observation, we may deduce from it the following proposition,—That unless we agree beforehand upon the import and precise limits of the terms we employ, discussion is futile, and a common understanding impossible.

‘ That which has most contributed to hinder the due tracing of our ideas, and the finding out of their relations, and agreements or disagreements one with another, has been, I suppose,’ says Locke, ‘ the ill use of words. . . . Had men, in the discoveries of the material, done as they have in those of the intellectual, world, involved all in the obscurity of uncertain and doubtful ways of talking, volumes writ of navigation and voyages, theories and stories of zones and tides, multiplied and disputed ; nay, ships built, and fleets sent out, would never have taught us the way beyond the line ; and the Antipodes would be still as much unknown, as when it was declared heresy to hold there were any.’<sup>1</sup>

Speaking in a familiar manner, we may say, that

<sup>1</sup> Human Understanding, Bk. iv. ch. 3, § 30.

man cannot live alone. A powerful instinct of his nature calls for the society of his fellow-man; but this companionship cannot exist except upon a certain understanding. Each has desires inimical to the interests of the rest, at the same time that his interests depend upon association with them. To be absolutely free, man must sever himself from all others. To be absolutely happy, he must have some companionship. He elects to resign a portion of his freedom. He accepts restraint with the advantage attending it. The rule which defines the limit of his freedom is his first social law;<sup>1</sup> its object and aim being happiness. As to what constitutes happiness, the manner in which it is to be achieved, or the means by which it may be made secure, we find the greatest diversity of opinion. We say that the living together of several individuals necessitates some agreement as to the terms and conditions of the union; these terms must be expressed in the form of rules, and the rules must be *general*.

‘You cannot permit one action and forbid another, without showing a difference between them. Consequently, the same sort of actions must be generally permitted or generally forbidden. Where, therefore, the general permission of them would be pernicious, it becomes necessary to lay down and support the rule which generally forbids them. The assassin knocks the rich villain on the head, because he thinks him better out of the way than in it;’ and, in the particular case, such may be the fact. ‘If, however, you allow that excuse in the one instance, you must allow it to all who act in the same manner and from the same motive—

<sup>1</sup> As this chapter professedly treats the subjects it touches upon in a popular manner, the terms employed are here used in their popular sense.

that is, you must allow every man to kill any one he meets, whom he thinks obnoxious or useless; which, in the event, would be to commit every man's life and safety to the spleen, fury, and fanaticism, of his neighbour;—a disposition of affairs which would soon fill the world with misery and confusion; and ere long put an end to human society, if not to the human species.<sup>1</sup>

‘In the distribution of rights and obligations,’ says Bentham, ‘the legislator should have for his end the *happiness* of society. Investigating more distinctly in what that happiness consists, we shall find four subordinate ends—Subsistence, Abundance, Equality, Security.

‘The more perfect enjoyment there is in all these respects, the greater is the sum of social happiness: and especially of that happiness which depends upon the laws.

‘We may hence conclude that all the functions of law may be referred to these four heads:—To provide subsistence; to produce abundance; to favour equality; to maintain security.

‘This division has not all the exactness which might be desired. The limits which separate these objects are not always easy to be determined. They approach each other at different points, and mingle together. But it is enough to justify this division, that it is the most complete we can make; and that, in fact, we are generally called to consider each of the objects which it contains, separately and distinct from all the others. . . .

‘Some persons may be astonished to find that *liberty* is not ranked among the principal objects of law. But a clear idea of liberty will lead us to regard it as a

<sup>1</sup> Paley, Moral and Political Philosophy, Bk. ii. ch. 7.

branch of security. Personal liberty is security against a certain kind of injuries which affect the person. As to what is called *political liberty*, it is another branch of security,—security against injustice from the ministers of government. What concerns this object belongs not to civil, but to constitutional law.<sup>1</sup>

**Happiness** in its full extent, is the utmost pleasure we are capable of; and misery the utmost pain: and the lowest degree of what can be called happiness, is so much ease from all pain, and so much present pleasure, as without which, any one cannot be content.<sup>2</sup>

Happiness is a state of the mind; it is the consciousness of pleasure. Happiness being a condition of the mind, and the mind being dependent upon the body, the degree of happiness must, under ordinary circumstances, depend upon the condition of the mind, and the condition of the mind upon that of the body. The condition of the mind and that of the body is in all cases almost entirely the result of circumstances, education, and habit; therefore, though happiness is absolute, the cause of happiness is relative, or, in other words, the same thing will produce in different individuals, or in the same individual at different times, happiness or misery. We have said that perfect freedom and consort with others are incompatible; and that man, in making his election, gives the preference to society, and thus voluntarily relinquishes a portion of his free will. This abandonment of a portion of the natural rights of each member of a community, which we may term the *inimical will*, is a concession made

<sup>1</sup> Theory of Legislation. Principles of the Civil Code, part i. ch. 2.

<sup>2</sup> Human Understanding, Bk. ii. ch. 21, § 42.

for the general good, and is the first step or idea in the notion of an organized community, and the true basis of every rational political system.

Nothing, however, would be more erroneous than to suppose that law, or the legislator, is, or can be, the sole regulator of society. The moment a community assumes any magnitude, that moment it is broken up into sections, each section or group being a body or class within the greater body. Indeed, this phenomenon, the direct and immediate result of a previous proposition, that man seeks companionship, manifests itself in this, that not merely does he seek and appear to require it, but he selects out of the number that or those individuals whose circumstances, temperaments, and habits, make them his most congenial associates. Examples of this are presented in the family circle, where, whatever may be the affection of the children for their parents, they find in those of their own age a something in common, which instinctively draws them together, and renders them, to a given degree, a community, regulated by two sets of principles, those common to the whole family, and those peculiar to themselves. As the society increases in magnitude, division and subdivision multiply till we find sections and subsections representing every peculiarity of social position and sentiment. The constraining forces of each individual being, 1st, the law common to the whole; 2nd, the general views as to right and wrong, concerning things not within the purview of the laws, *e.g.* parental affection; and 3rd, the particular views or notions respecting matters peculiar to his special class. We have thus three controlling forces acting upon each individual,—1st, the law; 2nd, the *general mo-*

*rality* of the community; and, 3rd, the *particular morality* of his immediate associates, which, to distinguish it, may be termed *sectional morality*.

Bentham says,—‘Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. . . .

‘Morality commands each individual to do all that is advantageous to the community, his own personal advantage included. But there are many acts useful to the community which legislation ought not to command. There are also many injurious actions which it ought not to forbid, although morality does so. In a word, legislation has the same centre with morals, but it has not the same circumference.

‘There are two reasons for this difference; 1st, legislation can have no direct influence upon the conduct of men, except by punishments. Now these punishments are so many evils, which are not justifiable except so far as there results from them a greater sum of good. But, in many cases in which we might desire to strengthen a moral precept by a punishment, the evil of the punishment would be greater than the evil of the offence. The means necessary to carry the law into execution would be of a nature to spread through society a degree of alarm more injurious than the evil intended to be prevented.

‘2nd. Legislation is often arrested by the danger of overwhelming the innocent in seeking to punish the guilty. Whence comes this danger? From the difficulty of defining an offence, and giving a clear and precise idea of it. For example, hard-heartedness, ingratitude, perfidy, and other vices which the popular sanction punishes, cannot come under the power of the

law, unless they are defined as exactly as theft, homicide, or perjury.<sup>1</sup>

In addition to the external forces which tend to conform man's conduct to the will of the society of which he is a member, are three native motive principles—*acquisitiveness, indolence, and curiosity*.

The primary motive principles of man may be reduced to three. Acquisitiveness, inducing exertion; indolence, or the love of repose, the recuperative principle; and the intermediate, or mean principle, of curiosity; to one of which it would appear that every human action may be referred. The first two present, in the most striking manner, the theory of *conflicting principles*, show that they are natural, and point out their true value, and what I apprehend to be the real basis of the doctrine of *utility*. To the first the great bulk of human energy is to be ascribed; in the second we see the safety-valve, the point beyond which enterprise cannot safely be carried. The mean principle may be regarded as an auxiliary to each of the others; for while it promotes the aim of the first, it satisfies the demands of the second by discovering the means by which the one may be gratified at the least cost to the other.

Last, but by no means least, in the scale of importance, as an agent of social order and tranquillity, is the fact that the great majority of human actions are purely mechanical or automatic—that is to say, are performed without any direct present effort of the will; they are the result of mere habit. Nor must it be supposed that this action is confined to things in their nature

<sup>1</sup> Principles of Legislation, ch. 12. The Limits which separate Morals from Legislation.

purely mechanical; for, anomalous as it may appear, it is the fact, that by far the greater number of our mental acts are performed in the same manner; the truth of which becomes abundantly clear by reflection on the conduct of a single day. Were it not for this merciful provision or faculty, human action would either be reduced to a degree difficult to realise, or reason be overthrown. The effect of habit and this automatic action upon social institutions is apparent in our conservative tendencies, which grow in strength as we increase in years. In short, to so great an extent is man the creature of habit, that when habits are once contracted, whether good or bad, it requires an effort, seldom made, to change; thus institutions, old, unsuitable, and even repugnant to the spirit of the times, are suffered to exist, and practices known to be pernicious are persisted in.

‘Concerning a man’s liberty, there yet, therefore, is raised this farther question, Whether a man be free to will? which, I think, is what is meant when it is disputed whether the will be free. And as to that, I imagine that, willing, or volition, being an action, and freedom consisting in a power of acting, or not acting, a man in respect of willing, or the act of volition, when an action in his power is once proposed to his thoughts, as presently to be done, cannot be free. The reason whereof is very manifest; for it being unavoidable that the action depending on his will, should exist, or not exist; and its existence, or not-existence, following perfectly the determination and preference of his will, he cannot avoid willing the existence, or not-existence, of that action. It is absolutely necessary that he will the one, or the other—that is, prefer the one to the other—since

one of them must necessarily follow ; and that which does follow, follows by the choice and determination of his mind—that is, by his willing it ; for if he did not will it, it would not be. So that, in respect of the act of willing, a man, in such a case, is not free ; liberty consisting in a power to act, which, in regard to volition, a man, upon such a proposal, has not. For it is unavoidably necessary, to prefer the doing or forbearance of an action in a man's power, which is once so proposed to his thoughts ; a man must necessarily will the one or the other of them, upon which preference or volition, the action, or its forbearance, certainly follows, and is truly voluntary ; but the act of volition, or preferring one of the two, being that which he cannot avoid, a man, in respect of that act of willing, is under a necessity, and so cannot be free ; unless necessity and freedom can consist together, and a man can be free and bound at once.<sup>1</sup>

What determines the Will ? ‘The true and proper answer is, the mind. For that which determines the general power of directing to this or that particular direction, is nothing but the agent itself exercising the power it has that particular way. If this answer satisfies not, it is plain the meaning of the question, What determines the will ? is this, What moves the mind, in every particular instance, to determine its general power of directing to this or that particular motion or rest ? And to this, I answer, the motive for continuing in the same state or action, is only the present satisfaction in it ; the motive to change, is always some uneasiness : nothing setting us upon the change of state, or upon any new action, but some uneasiness. This is the great

<sup>1</sup> Human Understanding, Bk. ii. ch. 21, §§ 22, 23.

motive that works on the mind, to put it upon action, which, for shortness' sake, we will call determining of the will.<sup>1</sup>

With this brief survey of the philosophy of human action, to which our attention will be called hereafter, we may now, somewhat more in detail, examine the distinction between Divine positive law and natural law, or the unwritten Divine will, together with the means by which it is to be ascertained.

The sources of law are the Deity, sovereignty, and the individual. To avoid confusion, the student must distinguish between the following subjects, and the appropriate matter of each:—(1) Divine positive law; or, revealed religion. (2) Natural law; or, the unwritten will of God. (3) Positive law; or, what may be termed the law of the land. (4) International law; or, the rules regulating the intercourse of nations. (5) Constitutional law; or, the principles of the internal constitution of a given state. (6) Positive morality; and (7) Objects metaphorically termed laws.

Lord Mackenzie gives, as the principal divisions of law,—(1) The Divine positive law; (2) Natural Law; (3) The positive law of Independent States; and (4) The Law of Nations, or International Law.<sup>2</sup>

**Divine Positive Law.**—Lord Mackenzie says,—‘The positive law of God is that which concerns the duties of religion, being the principles regarding faith and manners revealed in the Holy Scriptures. The precepts derived from revelation are called the divine positive law, as distinguished from the divine natural law, which is composed of principles

<sup>1</sup> Human Understanding, Bk. ii. ch. 21, § 29.

<sup>2</sup> Studies in Roman Law, p. 46.

recognized by reason alone, without the aid of revelation.’<sup>1</sup>

In this all civilized nations, whether ancient or modern, have concurred—there is a God, and to Him man owes his being, obedience, and worship. In this also the same nations have agreed—that He has revealed Himself to man, not only in His mighty works, which we call Nature, but also more directly in Holy Scripture, or sacred writings. But here unanimity ends. The sacred writings of the Jew, the Christian, the Mohammedan, the Buddhist, the Confucian, are not the same; and, while each conscientiously adheres to his own, each persistently rejects those of the rest. Implicit, then, as may be individual belief in the sacred books of his race,—unquestionable as is the fact that the Christian religion forms an important element in the laws of those nations that entertain that belief, and conspicuously amongst them our own, it is no less clear that the laws of every other nation are bound up with its peculiar theology. Whilst, therefore, on the one hand, the student of general jurisprudence is, in order to understand any particular legal system, compelled to familiarize himself with the theology of its founders,—for otherwise he cannot trace its influence upon that system,—he is, upon the other hand, precluded from adopting his own religious views as the standard of right and wrong, and must confine himself, during his investigations, to the consideration of the Almighty as He has been pleased to reveal Himself in nature, *i. e.*, to what is termed natural religion, or the unwritten will of God, or natural law. Nor need the Christian jurist hesitate to accept this position, for he may be

<sup>1</sup> Studies in Roman Law, p. 46

satisfied that revelations of Omniscience can never be repugnant the one to the other.

**Natural Law.**—‘Natural law, as the term is commonly understood by modern writers upon jurisprudence, has two disparate meanings. It signifies the law of God, or a portion of positive law and positive morality.’<sup>1</sup>

Dr. Paley considers natural law as equivalent to moral science, which embraces our duties to God, to our neighbours, and to ourselves.<sup>2</sup>

The Roman jurist Ulpian describes natural law as the law which nature has taught all living creatures, and declares it to be common to men and beasts.<sup>3</sup>

Chancellor Kent says,—‘By the law of nature, I understand those fit and just rules of conduct which the Creator has prescribed to man as a dependent and social being, and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared, by Divine revelation.’<sup>4</sup>

Natural Law is defined by Grotius to be ‘the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are therefore, as such, necessarily commanded or prohibited by God.’<sup>5</sup>

‘Though,’ says Locke, ‘God has given us no in-

<sup>1</sup> Austin, p. 38.

<sup>2</sup> Paley’s Moral Philosophy, Book I. ch. i. p. 1.

<sup>3</sup> Just. Dig. 1. 1. 3.

<sup>4</sup> Wightman v. Wightman, 4 Johns. ch. R. 2, § 348,

<sup>5</sup> De Jur. Bel. ac Pac., lib. i. cap. i., § x. 1, 2.

nate ideas of Himself,—though He has stamped no original characters in our minds, wherein we may read His being,—yet, having furnished us with those faculties our minds are endowed with, He hath not left Himself without witness; since we have sense, perception, and reason, and cannot want a clear proof of Him as long as we carry ourselves about us. Nor can we justly complain of our ignorance in this great point, since He has so plentifully provided us with the means to discover and know Him, so far as is necessary, to the end of our being, and the great concernment of our happiness. But though this be the most obvious truth that reason discovers, and though its evidence be, if I mistake not, equal to mathematical certainty; yet it requires thought and attention, and the mind must apply itself to a regular deduction of it from some part of our intuitive knowledge, or else we shall be as uncertain and ignorant of this as of other propositions which are in themselves capable of clear demonstration.<sup>1</sup>

**Good and Evil.**—‘Things are good or evil, only in reference to pleasure or pain. That we call good, which is apt to cause or increase pleasure, or diminish pain in us; or else to procure, or preserve, us the possession of any other good, or absence of any evil. And, on the contrary, we name that evil, which is apt to produce or increase any pain, or diminish any pleasure in us; or else to procure us any evil, or deprive us of any good. By pleasure and pain, I must be understood to mean of body or mind, as they are commonly distinguished; though, in truth, they be only different constitutions of the mind, sometimes occasioned by

<sup>1</sup> Human Understanding, Bk. ii. ch. 10, § 1.

disorder in the body, sometimes by thoughts of the mind.'

'Actions,' says Paley, 'are to be esteemed by their tendency. Whatever is expedient, is right. It is the utility of any moral rule alone, which constitutes the obligation of it. Actions in the abstract are right or wrong, according to their *tendency*; the agent is virtuous or vicious according to his *design*. Thus, if the question be, whether relieving common beggars be right or wrong? We enquire into the *tendency* of such a conduct to the public advantage or inconvenience. If the question be, Whether a man remarkable for this sort of bounty is to be esteemed virtuous for that reason? we enquire into his *design*, whether his liberality springs from charity or from ostentation? It is evident that our concern is with actions in the abstract.

'But to all this there seems a plain objection, viz., that many actions are useful, which no man in his senses will allow to be right. There are occasions, in which the hand of the assassin would be very useful. The present possessor of some great estate employs his influence and fortune, to annoy, corrupt, or oppress all about him. His estate would devolve, by his death, to a successor of an opposite character. It is useful, therefore, to dispatch such an one, as soon as possible, out of the way; as the neighbourhood will exchange thereby a pernicious tyrant for a wise and generous benefactor. It might be useful to rob a miser, and give the money to the poor; as the money, no doubt, would produce more happiness, by being laid out in food and clothing for half-a-dozen distressed families, than by

<sup>1</sup> Human Understanding, Bk. ii. ch. 20, § 2.

continuing locked up in a miser's chest. What then shall we say? Must we admit these actions to be right, which would be to justify assassination and plunder; or must we give up our principle, that the criterion of right is utility. It is not necessary to do either.

‘The true answer is this—that these actions, after all, are not useful, and for that reason, and that alone, are not right. To see this point perfectly, it must be observed that the bad consequences of actions, are twofold, *particular* and *general*. The particular bad consequence of an action, is the mischief which that single action directly and immediately occasions. The general bad consequence is, the violation of some necessary or useful *general* rule. The general bad consequence in the first instance (assassination) is the violation of this necessary general rule, that no man be put to death for his crimes but by public authority.’<sup>1</sup>

**The two Schools of Moral Theology.**—‘Shortly after the Reformation, we find two great schools of thought dividing questions of moral theology—more modernly, moral philosophy—between them. The most influential of the two was at first the sect or school known to us as the Casuists, all of them in spiritual communion with the Roman Catholic Church, and nearly all of them affiliated to one or other of her religious orders. On the other side were a body of writers, connected with each other by a common intellectual descent from the great author of the treatise *De Jure Belli et Pacis*, Hugo Grotius. Almost all the latter were adherents of the Reformation. The book of Grotius, though it touches questions of

pure Ethics in every page, and though it is the parent, immediate or remote, of innumerable volumes of formal morality, is not, as is well known, a professed treatise on Moral Philosophy; it is an attempt to determine the Law of Nature, or Natural Law.' It recognizes as of great authority, and freely borrows from, the Roman law. 'On the other hand, Casuistry borrows little from Roman law, and the views of morality contended for have nothing whatever in common with the undertaking of Grotius. All that philosophy of right and wrong which has become famous, or infamous, under the name of Casuistry, had its origin in the distinction between Mortal and Venial sin. A natural anxiety to escape the awful consequences of determining a particular act to be mortally sinful, and a desire, equally intelligible, to assist the Roman Catholic Church in its conflict with Protestantism, by disburdening it of an inconvenient theory, were the motives which impelled the authors of the Casuistical philosophy to the invention of an elaborate system of criteria, intended to remove immoral actions, in as many cases as possible, out of the category of mortal offences, and to stamp them as venial sins. The fate of this experiment is matter of ordinary history. We know that the distinctions of Casuistry, by enabling the priesthood to adjust spiritual control to all the varieties of human character, did really confer on it an influence with princes, statesmen, and generals, unheard of in the ages before the Reformation, and did really contribute largely to that great reaction which checked and narrowed the first successes of Protestantism. But beginning in the attempt, not to establish, but to evade—not to discover a principle, but to escape a postulate—not to settle the nature of

right and wrong, but to determine what was not wrong of a particular nature,—Casuistry went on with its dexterous refinements till it ended in so attenuating the moral features of actions, and so belying the moral instincts of our being, that at length the conscience of mankind rose suddenly in revolt against it, and consigned to one common ruin the system and its doctors. The blow, long pending, was finally struck in the Provincial Letters of Pascal;<sup>1</sup> and since the appearance of those memorable papers, no moralist of the smallest influence or credit has ever avowedly conducted his speculations in the footsteps of the Casuists.<sup>2</sup>

**The two Schools of the Index to the unwritten Divine will.**—As there were two schools of moral theology, so were there two schools as to the true index to the unwritten Divine will—those who advocated the theory of ‘a Moral Sense,’ and those who supported that of ‘Utility.’

**Moral Sense.**—The theory of a moral sense may be expressed thus :—‘There are human actions which all mankind approve, human actions which all men disapprove; and these universal sentiments arise at the thought of those actions, spontaneously, instantly, and inevitably. Being common to all mankind, and inseparable from the thought of those actions, these sentiments are marks or signs of the Divine pleasure. They are proofs that the actions which excite them are enjoined or forbidden by the Deity. The rectitude or pravity of human conduct, or its agreement or disagreement with the laws of God, is instantly inferred from these sentiments, without the possibility of mistake.’<sup>3</sup>

<sup>1</sup> A.D. 1656.

<sup>2</sup> Maine, *Ancient Law*, p. 350.

<sup>3</sup> Austin, *Lectures on Jurisprudence*, vol. i. p. 107.

**Utility.**—The theory of *utility* may be briefly stated thus :—‘ God designs the happiness of all His sentient creatures. Some human actions forward that benevolent purpose, or their tendencies are beneficent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting His purpose, God has enjoined. The latter, as opposed to His purpose, God has forbidden. He has given us the faculty of observing, of remembering, of reasoning ; and, by duly applying those faculties, we may collect the tendencies of our actions. Knowing the tendencies of our actions, and knowing His benevolent purpose, we know His tacit commands.’<sup>1</sup>

Bentham says,—‘ I am a partisan of the *principle of utility* when I measure my approbation or disapprobation of a public or private act by its tendency to produce pleasure or pain ;—when I employ the words *just, unjust, moral, immoral, good, bad*, simply as collective terms including the ideas of certain pains or pleasures ; it being always understood that I use the words *pain* and *pleasure* in their ordinary signification.

‘ He who adopts the *principle of utility*, esteems virtue to be a good only on account of the pleasures which result from it ; he regards vice as an evil only because of the pains which it produces. Moral good is *good* only by its tendency to produce physical good ; Moral evil is *evil* only by its tendency to produce physical evil. But when I say *physical*, I mean the pains and pleasures of the soul as well as the pains and pleasures of sense. I have in view man, such as he is, in his actual constitution.

<sup>1</sup> Austin, vol. i. p. 109.

‘If the partisan of the *principle of utility* finds, in the common list of virtues, an action from which there results more pain than pleasure, he does not hesitate to regard that pretended virtue as a vice; he will not suffer himself to be imposed upon by the general error; he will not lightly believe in the policy of employing false virtues to maintain the true. If he finds, in the common list of offences, some indifferent action, some innocent pleasure, he will not hesitate to transport the pretended offence into the class of lawful actions; he will pity the pretended criminals, and will reserve his indignation for their persecutors.’<sup>1</sup>

‘If,’ says Austin, ‘we reject *utility* as the index to God’s commands, we must assent to the theory or hypothesis which supposes a *moral sense*. One of the adverse theories, which regard the nature of that index, is certainly true. He has left us to *presume* His commands from the tendencies of human actions, or He has given us a peculiar *sense* of which His commands are the objects.

‘All the hypotheses regarding the nature of that index, which discard the principle of utility, are built upon the supposition of a peculiar or appropriate *sense*. The language of each of these hypotheses differs from the language of the others, but the import of each resembles the import of the rest.’

‘By a *moral sense*, with which my understanding is furnished, I discern the human actions which the Deity enjoins and forbids. And, since you and the rest of the species are provided with a like organ, it is clear that this sense of mine is “the *common sense* of mankind.” By “a *moral instinct*,” with which the

<sup>1</sup> Principles of Legislation, ch. 1.

Deity has endowed me, I am urged to some of these actions, and am warned to forbear from others. "*A principle of reflection or conscience*," which Butler assures me I possess, informs me of their rectitude or pravity. Or "*the innate practical principles*," which Locke has presumed to question, define the duties, which God has imposed upon me, with infallible clearness and certainty.'

'These and other phrases,' he adds, 'are various but equivalent expressions for one and the same hypothesis. The only observable difference between these various expressions consists in this; that some denote *sentiments* which are excited by human actions, whilst others denote the *commands* to which those sentiments are the index.'<sup>1</sup>

In order to test the soundness of these conflicting theories, Austin, who is a strong advocate for the theory of utility, adopts the following imaginary case:—He supposes a solitary savage—a child abandoned in the wilderness immediately after its birth, and growing to the age of manhood in estrangement from human society. He says,—'I imagine that the savage, as he wanders in search of prey, meets, for the first time in his life, with a man. This man is a hunter, and is carrying a deer which he has killed. The savage pounces upon it. The hunter holds it fast. And, in order that he may remove this obstacle to the satisfaction of his gnawing hunger, the savage seizes a stone, and knocks the hunter on the head. Again: Shortly after, he meets with a second hunter, whom he also knocks on the head. But, in this instance, he is not the aggressor. He is attacked, beaten, wounded, with-

<sup>1</sup> Lectures on Jurisprudence, p. 147.

out the shadow of a provocation; and, to prevent a deadly blow which is aimed at his own head, he kills the wanton assailant.<sup>1</sup> Austin applies these several theories to the two positions. I leave the reader to do it for himself, and independently to determine whether or not the savage would, in either case, experience a sense of wrong-doing; and, also, whether or not the case, as put, is defective in this, that the savage is admittedly pressed by "gnawing hunger"; and, further, whether the case is not useless as a means of arriving at any truth. If such a being as is described could exist, is it not as unreasonable to attempt to deduce from his conduct the natural principles of man, as it would be to attempt to evolve them from the vagaries of a madman?

'The father of Caius Toranius had been proscribed by the Triumvirate. Caius Toranius, coming over to the interests of that party, discovered to the officers, who were in pursuit of his father's life, the place where he concealed himself, and gave them withal a description by which they might distinguish his person when they found him. The old man, more anxious for the safety and fortunes of his son than about the little that might remain of his own life, began immediately to enquire of the officers who seized him whether his son was well, whether he had done his duty to the satisfaction of his generals. "That son," replied one of the officers, "so dear to thy affections, betrayed thee to us; by his information thou art apprehended, and diest." The officer, with this, struck a poignard to his heart, and the unhappy parent fell, not so much affected by his fate as by the means to which he owed it.'<sup>2</sup>

<sup>1</sup> Austin, vol. i. p. 149.

<sup>2</sup> Valer. Max., lib. ix., c. 11.

Paley,<sup>1</sup> who quotes this, says,—‘Now the question is, whether, if this story were related to the wild boy caught some years ago in the woods of Hanover, or to a savage without experience, and without instruction, cut off in his infancy from all intercourse with his species, and, consequently, under no possible influence of example, authority, education, sympathy, or habit,—whether, I say, such an one would feel, upon the relation, any degree of *that sentiment* of disapprobation of Toranius’ conduct which we feel, or not ?

‘Those who maintain the existence of a moral sense ; of innate maxims ; of a natural conscience ; that the love of virtue and hatred of vice are instinctive ; or the perception of right and wrong intuitive,—all which are only different ways of expressing the same opinion,—affirm that he would.

‘Those who deny the existence of a moral sense, affirm that he would not. And upon this issue is joined.

‘As the experiment has never been made, and, from the difficulty of procuring a subject—not to mention the impossibility of proposing the question to him, if we had one—is never likely to be made, what would be the event, can only be judged of from probable reasons.

‘They who contend for the affirmative, observe, that we approve examples of generosity, gratitude, fidelity, &c., and condemn the contrary, instantly, without deliberation, without having any interest of our own concerned in them, oft-times without being conscious of, or able to give any reason for, our approbation ; that this approbation is uniform and universal, the

<sup>1</sup> Moral and Political Philosophy, bk. 1, ch. 5.

same sorts of conduct being approved or disapproved in all ages and countries of the world ;—circumstances, say they, which strongly indicate the operation of an instinct, or moral sense.

‘ On the other hand, answers have been given to most of these arguments by the patrons of the opposite system. And, first, as to the *uniformity* above alleged, they controvert the fact. They remark, from authentic accounts of historians and travellers, that there is scarcely a single vice which, in some age or country of the world, has not been countenanced by public opinion; that in one country it is esteemed an office of piety in children to sustain their aged parents, in another to despatch them out of the way; that suicide, which, in one age of the world has been heroism, is in another felony; that theft, which is punished by most laws, by the laws of Sparta was not unfrequently rewarded; that the promiscuous commerce of the sexes, although condemned by the regulations and censure of all civilized nations, is practised by the savages of the tropical regions without reserve, compunction, or disgrace; that crimes, of which it is no longer permitted us even to speak, have had their advocates amongst the sages of very renowned times; that, if an inhabitant of the polished nations of Europe be delighted with the appearance, wherever he meets with it, of happiness, tranquillity, and comfort, a wild American is no less diverted with the writhings and contortions of a victim at the stake; that in the above instances, and perhaps in most others, *moral approbation* follows the fashions and institutions of the country we live in, which fashions also and institutions themselves have grown out of the exigencies—the climate, situation, or local circumstances

—of the country ; or have been set up by the authority of an arbitrary chieftain, or the unaccountable caprice of the multitude :—all which, they observe, looks very little like the steady hand and indelible characters of Nature.'

After citing other objections, he says,—' Upon the whole, it seems to me, either that there exist no such instincts as compose what is called the moral sense, or that they are not now to be distinguished from prejudices and habits, on which account they cannot be depended upon in moral reasoning. I mean, that it is not a safe way of arguing, to assume certain principles as so many dictates, impulses, and instincts of Nature, and then to draw conclusions from these principles as to the rectitude or wrongness of actions, independent of the tendency of such actions, or of any other consideration whatever.'

Both theories appear defective in this : each assumes that the will of God respecting any matter may be immediately ascertained by any individual. The theory of a moral sense assumes that no peculiarity of circumstances can affect human conviction as to what is right and what wrong. The theory of utility, on the other hand, declares right to be simple conformity to the exigencies of existing circumstances. The former theory, in fact, denies the advantage of any moral instruction. The latter repudiates the teaching of experience. The advocates of the former reject the possibility of ignorance. The advocates of the latter accept the present state of things as the criterion. Is it not possible to agree in part with each, in full with neither ? Ascribing the origin of man to God, is it unreasonable to suppose that man has by nature *a latent*

*moral* sense; and that, when properly educated, this moral sense is developed—when improperly educated, that it is undeveloped, warped, or utterly destroyed? Is it unreasonable to presume that a given act under given circumstances may be right in the sight of God, to whom it would at the same time be more pleasing that the circumstances should be so changed as to render that act unnecessary, inexpedient, or even wrong?

‘Without being written on their hearts,’ Locke says, ‘many men may, by the same way that they come to the knowledge of other things, come to assent to several moral rules, and be convinced of their obligation. Others also may come to be of the same mind, from their education, company, and customs of their country; which persuasion, however got, will serve to set conscience on work, which is nothing else but our own opinion or judgment of the moral rectitude or pravity of our own actions. And if conscience be a proof of innate principles, contraries may be innate principles; since some men, with the same bent of conscience, prosecute what others avoid.’

We have noticed the two theories of moral philosophy, and the two theories as to the index to the unrevealed Divine will. We will now rapidly glance at the various theories as to the origin of law.

**Theories as to the Origin of Law.**—The conviction in the minds of all thinking men who have devoted their attention to the study of law, that jurisprudence can, and ought to be submitted to scientific treatment, has given birth to various theories as to the origin of law, it being assumed that the settlement of this point

<sup>1</sup> Human Understanding, Bk. i. ch. 3, § 8.

is the basis upon which the science must rest. All ancient societies which from a patriarchal or rude commencement developed into important nationalities, appear at some period of their existence to have conceived the desire to draw up some record of their history. The facts connected with their primitive existence being buried in oblivion, or but imperfectly transmitted in tradition, they have not hesitated to trace the lineage of their kings, to ascribe the origin of their laws, and the foundation of their institutions, to heaven. For a time the sanctity thus thrown around them has shielded them from violence, and in many instances preserved them intact till a period when their very oddity has cast ridicule upon their high pretensions. The fall, however, of individual princes, the overthrow of ancient institutions, and the repeal of obnoxious laws, have left unshaken the conviction that it is good for men to live together; that it is the Divine will that they should do so; that while certain institutions are beneficial, others are not; and that such as are baneful cannot be sanctioned by the Almighty. There is a vague notion of a state of perfect happiness, of a perfect state of society. Some are of opinion that man has degenerated from it; others, that it has not yet been reached by man, but that he is steadily progressing toward it. The Romans said that every system of jurisprudence consisted of two parts; the one they called the *jus civile*, the other the *jus naturale*, quod natura omnia animalia docuit; for, said they, 'All nations that are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind.' The ordinances dictated by Natural Law, or the Law of Na-

tions, the Jus Naturale or Jus Gentium, were styled natural equity, *naturalis æquitas*.<sup>1</sup>

'After *Nature* had become a household word in the mouths of the Romans, the belief gradually prevailed among the Roman lawyers that the old Jus Gentium was, in fact, the lost code of Nature, and that the Prætor, in framing an Edictal jurisprudence on the principles of the Jus Gentium, was gradually restoring a type from which law had only departed to deteriorate.'<sup>2</sup>

Passing from the time of the Romans to the 16th century—for between these periods the Western world at least troubled itself but little with the Science of Jurisprudence—we encounter conflicting theories. Grotius (1583—1645), the celebrated author of "*De Jure Belli et Pacis*," adopted the theory of a Jus Gentium, but, by applying it to International Law, gave to it a meaning that it did not possess with the Romans. Hobbes (1588—1679), whose theory was purposely devised to repudiate the reality of a law of nature as conceived by the Romans, ascribes the origin of sovereignty, and of independent political society, to a fictitious agreement or covenant. He imagines that the future subjects covenant with one another, or that the future subjects covenant with the future sovereign, to obey without reserve every command of the latter. And of this imaginary covenant immediately preceding the formation of the political government and community, the religious duty of the subjects to render unlimited submission, and the right divine of the sove-

<sup>1</sup> For the several meanings of the term Equity, see chap. ii., Equity. For its influence on Roman Law, see Ortolan's History of the Roman Law, by Prichard and Nasmith.

<sup>2</sup> Maine, p. 56.

reign to exact and receive such submission, are, according to Hobbes, necessary and permanent consequences. He supposes, indeed, that the subjects are induced to make that agreement by their perception of the expediency of government, and by their desire to escape from anarchy.

Montesquieu (1689—1755), in his 'Esprit des Lois,' says,—'Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses : et dans ce sens tous les êtres ont leurs lois.' He regarded the nature of man as entirely plastic, as passively reproducing the impressions, and submitting implicitly to the impulses, which it receives from without. He regarded laws as the creatures of climate, local situation, accident, or imposture.

Rousseau (1712—1788), in his essay 'Sur l'Inégalité parmi les Hommes,' compares the wild and civilized man, represents the former as the state of nature and innocence, and treats the idea of property, and the wealth and inequality of condition to which it gives rise, as the source of misery and corruption among men. To him law has much the character of arbitrary rules imposed by the strong upon those in subjection to them. The idea of master and slave appears never to be entirely absent from his mind.

Bentham (1749—1832) is an advocate of the historical theory. He says that societies modify, and have always modified, their laws according to the modifications of their views of general expediency, and that laws should be founded on an experimental view of the subjects and objects of law, and should be determined by general utility, not drawn out from a few arbitrary assumptions *à priori*, called the law of nature.

Referring to these various theories, Mr., now Sir Henry Sumner Maine, says:—

‘There is such widespread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the questions they pretend to dispose of, as to justify the suspicion that some line of inquiry, necessary to a perfect result, has been incompletely followed or altogether omitted by their authors. And, indeed, there is one remarkable omission with which all these speculations are chargeable, except, perhaps, those of Montesquieu. They take no account of what has actually been at epochs remote from the particular period at which they made their appearance. Their originators carefully observed the institutions of their own age and civilization, and those of other ages and civilizations with which they had some degree of intellectual sympathy; but, when they turned their attention to archaic states of society which exhibited much superficial difference from their own, they uniformly ceased to observe, and began guessing. The mistake which they committed is therefore analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients. One does not certainly see why such a scientific solecism should be more defensible in jurisprudence than in any other region of thought. It would seem antecedently that we ought to commence with the simplest social forms, in a state as near as possible to their rudimentary condition. In other words, if we followed the course usual in such inquiries, we should penetrate as far up as we could in the history

of primitive societies. The phenomena which early societies present us with are not easy at first to understand, but the difficulty of grappling with them bears no proportion to the perplexities which beset us in considering the baffling entanglement of modern social organisation. But even if they gave more trouble than they do, no pains would be wasted in ascertaining the germs, out of which has assuredly been unfolded every form of moral restraint which controls our actions and shapes our conduct at the present moment.<sup>1</sup>

It is by no means difficult to endorse these sentiments; it is not, however, easy to understand how their author, professedly acting upon them, should have laid his foundation where he did. He says,—‘The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words, “Themis” and “Themistes.” Themis, it is well-known, appears in the latter Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea; and it is in a very different sense that Themis is described in the *Iliad*, as the assessor of Zeus.’

If jurisprudence is to be treated as a science, we must begin with first principles. We must contemplate man, or endeavour to do so, in his primitive state, first as an individual, secondly as a social being. The result of such an investigation will, I venture to think, be to induce the conviction, that law is natural to man, that it is of the essence of his being. In one word, that “lawless man” is a something the human mind cannot conceive.

The first sensation of man is “coercion.” He is

<sup>1</sup> Maine, p. 118.

subject to the influence of two classes of forces, the internal and the external—internal cravings, external repulsions or enticements. He craves food, drink, sympathy. He is repelled by the storm, or the cold, alike of the heavens or of his brother man.

Beginning, then, at the beginning, it may not be without profit briefly to consider Adam and Eve, or the first human pair and their family; assuming for the moment that, whether the reader is disposed to accept our Scriptures as of authority or not, he at least rejects the humble origin assigned to us by a modern philosopher.

Assuming a first pair, we assume creation and not birth; let us also assume that the first sun that shone upon Adam and Eve exhibited them in maturity. We may fairly argue the rest. The glories of Paradise, for such the world must have seemed, possibly so absorbed our first parents as to preclude, during the short hours of their first day, every other consideration. That day had, however, like all others, an end; and, when the night closed in, they became conscious of limited capacity, the eye lost its power; and as sleep crept over them, their consciousness departed. They may have been bewildered, but the waking day recalled them to consciousness, possibly to the fact of hunger; if so, they felt a want, and when satisfied had learned that food removes hunger, and water thirst. The succession of day and night, the changes of the seasons, hunger and thirst, laid the foundation of self-support and self-control; demonstrated their limited powers, weakness, and dependence; and induced labour, industry, and forethought. The fatigue attending labour, and the discomfort or pain accompanying ex-

cessive gratification of the palate, gave them their first lessons in moderation and self-denial. And, as by experience they early learned that it was good to eat when hungry, to drink when thirsty, and to sleep when tired, and then only, they felt that things are not absolutely, but merely relatively, good or bad, right or wrong.

As their family increased around them, and each developed his idiosyncrasies, lessons in human nature followed each other in rapid succession. Nor could our first parents have failed to discover, to a large extent, the will of God concerning man, by merely observing the effects upon their individual children, and the rest of the family, of industry as opposed to indolence, generosity to selfishness, truthfulness to deceit, kindness to cruelty, or of ambition, cunning, or the love of approbation depending upon its direction or tendency, as exhibited by the various members of the family.

His senses, and his reason founded upon observation, were ample to satisfy Adam, that personal happiness materially depends upon that of one's associates, and experience must have confirmed the fact. The distribution of the duties, necessitated by the exigencies of the family, between himself, his wife, and those of his children who were able to take a part, taught him the philosophy of the *division of labour*. The natural and necessary control of his family, and the affairs of his household, forced upon his attention the *fundamental principles of government*. The obvious difference between his children and their parents, and between his several children, resulting from age, sex, and habits, left no room for doubt that, whereas *equality between equals*

*is natural and therefore right*, any attempt to place unequals upon an equality would be a violation of natural principles. Sensible of a peculiar responsibility devolving upon him personally to maintain his family, any attempt on the part of an individual child to appropriate to himself some portion of the common stock other than that allotted to him by common consent, must have been regarded as a violation of *a right of property*; nor would he be less alive to the existence of that right to the exclusion of the pretensions of the remainder of his family, even including himself, attaching to the particular tool, implement, or article of dress, the produce of personal ingenuity or industry. Discovery, manufacture, and accretion would not unnaturally be regarded by him as the original modes of the acquisition of property. Inseparably connected with the very notion of property must have been the right of alienation; gifts and barter must have been common between the members of his family; and that property could be lost without being transferred, was apparent from the fact of its destruction. However he may have comported himself towards his children, the relationship existing between himself and his wife laid the foundation in his mind of the doctrine of contracts, matrimony being the first example. Nor could he have contemplated that contract, and the relative position of the parties to it, without realizing the fundamental principles of agency. It required no technical learning to enable him or his children to understand, that if an article was lent by one to the other, that it was the duty of the borrower to take due care of it while in his custody, and to return it to the owner, the time or the purpose being satisfied for which it had been lent; and

though it may be readily granted that they had no language to express the various kinds and incidents of bailments, it is equally reasonable to suppose that they were familiar with them. Nothing would be more unreasonable than to suppose that the life of the first family was a scene of unbroken concord and harmony; but if it was not, the duty devolved upon Adam to settle and adjust the disputes among his children, and his attention was therefore necessarily directed to the fundamental principles of the administration of justice; nor could the value and different qualities of evidence have failed to strike him. If amongst these disputes, as is most probable, he was called upon to settle a question of defamation of character, it is not unlikely that from his rude judgment-seat he expounded, in a forcible and intelligible manner, the destructive tendency of that wrong. And when at length, surrounded by his household, old and feeble, he became conscious of an approaching change, can it be doubted that he charged some of his sons with the care of their aged mother and infant sisters? If not, the doctrine of trusts is not a novelty. Can it be doubted that he made certain appropriations of his property, to take effect after his death? If not, the notion of the right to alienate property by devise is natural to man.

Should the reader be disposed to treat this as mere fanciful conjecture, let him ask himself, what there is that appears strange to his own mind; and if not satisfied by that experiment, let him watch and interrogate the youngest children he has access to, and he will soon satisfy himself that the doctrines of *meum* and *tuum* at least appear to come very naturally into the infant

mind. Or he may ask this question, Admitting such to be the case, what is the practical utility of establishing such a proposition? The question may be answered thus :—

1st. The division of legal notions into natural and artificial will facilitate an intelligent classification of the legal principles of any system.

2nd. By separating the natural from the artificial principles, we see at once the peculiarities of the particular system under study.

3rd. Having ranged the natural and artificial principles under distinct heads, we may subdivide each into substantive and adjective law.

4th. If we could agree as to what would constitute a complete natural system, 1st, of substantive law, and 2ndly, of adjective law—and there appears no reason why we should not—we should then possess a model or standard to which we might refer all existing systems.

Again, it may be asked, How is it, if sound principles are taught to man by nature, that we find so much in all human institutions that is at variance with them?

The answer appears to be this. Nature teaches but does not force obedience to her dictates. The consequence of indifference to her admonitions is punishment. It is a fact worthy of note, that there cannot be a tyrant where there are no slaves.

To secure life and peace, men are apt to relinquish all else; independence, freedom, rank, and even integrity and self-respect. The austerity of the parent or custodian of youth is an incentive to deception as a screen from punishment. The cruelty of masters has rendered slaves notoriously liars, and the tyranny of the despot has made a nation perfidious and false.

There is a tyranny of fashion, of public opinion, which is no less potent for mischief. Superstition and intolerance either prevent the exercise of reason and the growth of intelligence; or what is worse, force it to conceal itself, and to walk the world enmasked. A vicious system, which dignifies pedantry with the title of learning, in lieu of developing the natural faculties of youth by exercise in observation, comparison, and reasoning, dwarfs the young intellect with the practices of the parrot, and no less surely impedes mental development than the Chinese shoe does that of the physical foot. Remove these curses, the inventions of tyranny or ignorance, and nature will re-assert herself, mystery give place to truth, and reason take that of superstition.

To conclude this chapter, I purpose briefly to notice the terms *Jurisprudence* and *Positive Morality*; to state what is understood by the expression, The Science of Legislation, and to distinguish it from the Science of Ethics, or Deontology.

**Jurisprudence** — the science of positive law — is divided into two branches, *general jurisprudence*, or the science of general or universal positive law; and *particular jurisprudence*, or the science of the positive law peculiar to any given country, or, more correctly, to any given political society.

It is, then, to general jurisprudence that we must look for the principles common to all positive law; to the particular jurisprudence of our own country for the system peculiar to ourselves, or for English Municipal Law.

Perhaps no other term or word conveys to the mind a less clear notion or idea than the word LAW. We talk indifferently of the "laws of God," of the "laws

of the land," of the "laws of morality," of the "laws of honour," of the "laws of nations," of the "laws of science," of the laws of poetry, of painting, and of many other things.

With most, the terms *law* and *rule* are synonymous ; but to all it must be obvious that, when used in connection with these various and altogether dissimilar matters, the same word necessarily imports different things. Our first business, then, is to determine the sense in which it is here employed,—which may, in the first instance, be attempted negatively, by saying that it does not apply in either of the senses above, except as used in the expression "the law of the land."

Jurisprudence contemplates one form of human society—a *State* ; one form of power—*sovereignty* ; one class of laws—*commands* ; one class of rights and wrongs—*legal*.

'According to modern notions,' says Lord Mackenzie, 'Jurisprudence is the science or philosophy of positive law—that is, law established in an independent political community by the authority of its supreme government. By positive law, jurists understand a collection of rules, to which men living in civil society are subject in such a manner that they may, in case of need, be constrained to observe them by the application of force. General jurisprudence investigates the principles which are common to various systems of positive law, apart from the local, partial, and accidental peculiarities of each ; while particular jurisprudence treats of the law of a determinate nation, such as France or England. By French writers, jurisprudence is sometimes used, in a technical sense, to denote law founded on judicial decisions, or on the

writings of lawyers ; and in popular language it is frequently employed with us as synonymous with law.<sup>1</sup>

The Roman jurist did not, however, hesitate to define jurisprudence to be the knowledge of things divine and human, the science of right and wrong,—‘*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*’<sup>2</sup>

**Positive Morality.**—‘Of the laws properly so-called which are set by men to men, some are set by men as political superiors, or by men as private persons, in pursuance of legal rights. Others may be described in the following negative manner: they are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights.’

‘The laws, improperly so called, which are closely analogous to the proper, are merely opinions or sentiments held or felt by men in regard to human conduct. These opinions and sentiments are styled *laws*, because they are *analogous* to laws properly so called; because they resemble laws properly so called in *some* of their properties, or *some* of their effects or consequences.’<sup>3</sup>

**Objects metaphorically termed Laws.**—‘Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous applications of the term law, which rest upon a slender analogy, and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determining the movement of inanimate bodies or

<sup>1</sup> Mackenzie, p. 44.

<sup>2</sup> Just. Inst. 1, 1, 1.

<sup>3</sup> Austin, p. 174.

masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and therefore is too bounded to conceive the purpose of a law, there is not the will which law can work on, or which duty can incite or restrain.’<sup>1</sup>

**The Science of Legislation.**—‘*The public good* ought to be the object of the legislator; *general utility* ought to be the foundation of his reasonings. To know the true good of the community, is what constitutes the science of legislation; the art consists in finding the means to realize that good.

‘The principle of *utility*, vaguely announced, is seldom contradicted; it is even looked upon as a sort of commonplace in politics and morals. But this almost universal assent is only apparent. The same ideas are not attached to this principle; the same value is not given to it; no uniform and logical manner of reasoning results from it.

‘To give it all the efficacy which it ought to have, that is, to make it the foundation of a system of reasoning, three conditions are necessary:—

‘First. To attach clear and precise ideas to the word *utility*, exactly the same with all who employ it.

‘Second. To establish the unity and the sovereignty of this principle, by rigorously excluding every other. It is nothing to subscribe to it in general; it must be admitted without any exception.

‘Third. To find the process of a moral arithmetic by which uniform results may be arrived at.’<sup>2</sup>

**Ethics.**—‘The science of ethics, or, in the language of Mr. Bentham, the *science of deontology*, may be defined in the following manner:—It affects to determine the

<sup>1</sup> Austin, p. 90.

<sup>2</sup> Bentham, p. 1.

test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation. In other words, it affects to expound them as they should be; or, it affects to expound them as they ought to be; or, it affects to expound them as they would be if they were good or worthy of praise; or, it affects to expound them as they would be if they conformed to an assumed measure.

‘The science of ethics consists of two departments: one relating specially to positive law, the other relating specially to positive morality. The department which relates specially to positive law, is commonly styled the *science of legislation*, or, simply and briefly, *legislation*. The department which relates specially to positive morality, is commonly styled the *science of morals*; or, simply and briefly, *morals*.’<sup>1</sup>

As the science of ethics embraces the whole range of moral duties, its province is evidently much wider than that of jurisprudence, which treats only of those duties that can be enforced by external law. To explain these distinctions, writers on ethics affirm that what is enjoined by jurisprudence is of perfect obligation, and what is enjoined by morality is of imperfect obligation—that is, that we may or may not do what our conscience dictates, but that we can be compelled to do what positive law directs.

Experience shows that the number of actions which are commonly withdrawn from the free will of the individual, and regulated by state legislation, is exceedingly various, being sometimes more and sometimes less, so that no limits can be assigned to the domain of

<sup>1</sup> Austin, p. 177.

law. Of positive moral rules, some are laws properly so called, being transcribed into the civil law, and adopted by it; while others are merely rules imposed by opinion, and not imperative, the obligation to observe them resting only upon the conscience.

The Divine law, morality, and positive law, are related to each other in various ways; and there are cases wherein they agree, wherein they disagree without conflicting, and wherein they disagree and conflict.

**Justice and Injustice.**—‘When Hobbes affirms that “no law can be unjust,”—an assertion that may appear to many a startling paradox,—he means, that no positive law is *legally unjust*; and this is quite correct. For the measure or test of *legal justice* and *injustice* is positive law. But, although an act may be just, as tried by a given law, the law itself may be unjust, as measured by a different standard, such as the Divine law, or positive morality.’

‘Though it signifies conformity or nonconformity to any determinate law, the term *justice* or *injustice* sometimes denotes emphatically conformity or nonconformity to the ultimate measure or test, namely, the Law of God. This is the meaning annexed to justice, when law and justice are opposed.’<sup>1</sup>

Natural justice or equity, says Lord Mackenzie, consists in doing what is right in the circumstances of each particular case. Legal justice means acting in conformity with positive law.

Justice was defined by Ulpian to be a constant and uniform disposition of mind to render to every one his due,—‘*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*’

<sup>1</sup> Studies in Roman Law, p. 45. See Austin, p. 275, note.

<sup>2</sup> Dig. 1, 1, 10.

I have grouped together, and briefly noticed, in this chapter, those subjects which, while strictly belonging to the science of jurisprudence, may with propriety—in order to distinguish them from the contents of the next chapter—be termed the *speculative* matter of jurisprudence. The term “speculative” must not, however, be understood as denoting inferiority; for, imperfect as is this sketch, the reader can hardly fail to be impressed with the fact, that without clear notions concerning these debated subjects, and the contentions of the rival theorists, he is in constant peril of misleading, and of being misled, at the very threshold of the science, by the peculiar use of a single word or expression.

## CHAPTER II.

## GENERAL JURISPRUDENCE.

(For a general view of the subject-matter of this chapter, the reader is referred to Table II.)

**A Natural Society**—a society in a state of nature—is composed of persons who are connected by mutual intercourse, but are not *members*, sovereign or subject, of any *society political*. None of the persons who compose it lives in the positive state, which is styled a state of subjection; or, all the persons who compose it live in the negative state, which is styled a state of independence.<sup>1</sup>

**An Independent Body Political** is one which recognizes no superior, and which consists of two elements, the *sovereign* or governing, and the *subject* or governed.

**A Nation**.—‘An independent political society is often styled a “nation,” or a “sovereign and independent nation.” But the term “nation,” or the term “*gens*,” is used more properly with the following meaning. It denotes an aggregate of persons, exceeding a single family, who are connected through blood or lineage, and, perhaps, through a common language. And, thus understood, a “nation” or “*gens*” is not necessarily an independent political society.’<sup>2</sup>

‘In order that an independent society may form a society political, it must not fall short of a *number*

<sup>1</sup> Austin, p. 231.

<sup>2</sup> *Ib.*, p. 249, note.

which cannot be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members are habitually obedient or submissive to a certain and common superior.<sup>1</sup>

**A State** may be defined to be an independent body political, or society of men possessing a given territory, united together for the purpose of promoting their mutual security and advantage by their combined strength.

**Half Sovereign States.**<sup>2</sup>—‘All Sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State inferior in power is legally affected by its connection with the other. Treaties of equal alliance, freely contracted between independent States, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty, according to the stipulation of the treaties. States which are thus dependent upon other States, in respect to the exercise of certain rights essential to the perfect external sovereignty, have been termed *Semi-Sovereign States*.’<sup>3</sup>

<sup>1</sup> Austin, p. 237.

<sup>2</sup> In consequence of the great changes wrought by the French Revolution, such communities or governments have wholly or nearly disappeared.

<sup>3</sup> Wheaton, p. 58.

**Composite States,** or *supreme federal governments*.—‘It frequently happens, that one society political and independent arises from a federal union of several political societies; or, rather, that one government political and sovereign arises from a federal union of several political governments. By some of the writers on positive international law, such an independent political society, or the sovereign government of such a society, is styled a *composite state*. But the sovereign government of such a society might be styled more aptly, as well as more popularly, a *supreme federal government*.’<sup>1</sup>

**Confederated States;** or, a *permanent confederacy of supreme governments*.—‘It also frequently happens, that several political societies which are severally independent, or several political governments which are severally sovereign, are compacted by a permanent alliance. By some of the writers on positive international law, the several societies, or governments, considered as thus compacted, are styled a *system of confederated states*. But the several governments, considered as thus compacted, might be styled more aptly, as well as more popularly, a *permanent confederacy of supreme governments*.’<sup>2</sup>

As in all independent political bodies there are two elements, the *governing* and the *governed*, or the *sovereign* and the *subjects*, so in each the sovereign power must be lodged in the hands of either a single individual, or of a body consisting of individuals more or less numerous. A political society in which the sovereignty is lodged in the hands of one, is styled a monarchy; all others are termed aristocracies. Aristocracies are,

Austin p. 264.

<sup>2</sup> Austin, p. 264.

however, divided into aristocracies proper, oligarchies, and democracies.

**Monarchy.**—When the sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*.

**Aristocracy.**—When the sovereign portion consists of a number of members, the supreme government may be styled an *aristocracy*.<sup>1</sup>

**‘Republic, or Commonwealth,** has the following among other meanings:—1. Without reference to the form of the government, it denotes the main object for which a government should exist. It denotes the weal or good of an independent political society: that is to say, the aggregate good of all the individual members, or the aggregate good of those of the individual members whose weal is deemed by the speaker worthy of regard. 2. Without reference to the form of the government, it denotes a society political and independent. 3. Any aristocracy, or government of a number, which has not acquired the name of a limited monarchy, is commonly styled a republican government, or, more briefly, a republic. But the name “republican government,” or the name “republic,” is applied emphatically to such of the aristocracies in question as are deemed

<sup>1</sup> Governments which may be styled aristocracies, in the generic meaning of the expression, are not unfrequently distinguished into the three following forms: namely, *oligarchies*; *aristocracies*, in the specific meaning of the name; and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an *oligarchy*. If the proportion be deemed small, but not extremely small, the supreme government is styled an *aristocracy*, in the specific meaning of the name. If the proportion be deemed large, the supreme government is styled *popular*, or is styled a *democracy*. But these three forms of aristocracy, in the generic meaning of the expression, can hardly be distinguished with precision, or even with a distant approach to it. (Austin, p. 245.)

democracies or governments of many. 4. "Republic" also denotes an independent political society whose supreme government is styled republican.<sup>1</sup>

**Sovereignty**<sup>2</sup> is the supreme power by which any State is governed. This supreme power may be exercised either *internally* or *externally*.

Sovereignty is acquired by a State either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent; *e.g.*, the United States declared their independence of England on the 4th of July, 1776.

**Internal Sovereignty** is that which is inherent in the people of any State, or which is vested in its ruler by its municipal constitution or fundamental laws. This is the object of what has by some been called Internal public law, *Droit public interne*, by others *Constitutional law*.

**Constitutional Law** is defined by Austin to be 'the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme

<sup>1</sup> Austin, p. 249.

<sup>2</sup> The term "sovereign," or "*the* sovereign," applies to a sovereign body as well as to a sovereign individual. "Il sovrano" and "le souverain" are used by Italian and French writers with this generic meaning. "Die Obrigkeit," the person or body *over* the community, is also applied indifferently, by German writers, to a sovereign individual or a sovereign number; though it not unfrequently signifies the aggregate of the political superiors who in capacities supreme and subordinate govern the given society. But, though "sovereign" is a generic name for sovereign individuals and bodies, it is not unfrequently used as if it were appropriate to the former, as if it were synonymous with "monarch" in the proper acceptance of the term. "Sovereign," as well as "monarch," is also often misapplied to the foremost individual member of a so-called limited monarchy. Our own king, for example, is neither "sovereign" nor "monarch;" but, this notwithstanding, he hardly is mentioned oftener by his appropriate title of "king," than by those inappropriate and affected names." (Austin, p. 249.)

government, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside; and, supposing the government in question an aristocracy or government of a number, which determines moreover the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body.’<sup>1</sup>

**External Sovereignty** consists in the independence of one political society in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The rules by which it is regulated have by some been called External public law, *Droit public externe*, by others *International law*.

**Sovereignty founded on Consent.**—‘Every government has arisen through the *consent* of the people, or the bulk of the natural society from which the political was formed. For the bulk of the natural society from which a political is formed, submit *freely* or *voluntarily* to the inchoate political government. Or, changing the phrase, their submission is a consequence of *motives*, or they *will* the submission which they render. But a special approbation of the government to which they freely submit, or a preference of that government to every other government, may not be their motive for submission.’<sup>2</sup>

‘The distinguishing marks or characteristics of sovereignty and independent political society are:—1. The *bulk* of the given society are in the *habit* of obedience or submission to a *determinate* and *common* superior,

<sup>1</sup> Austin, p. 274.

<sup>2</sup> *Ib.* p. 306.

whether that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in the habit of obedience to a determinate human superior.’<sup>1</sup>

**Subject—Subjection.**—‘To the determinate superior, the other members of the society are *subject*; or, on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.’<sup>2</sup> The sovereign portion of the British Nation is the Parliament, or tripartite body of King, Lords, and Commons.<sup>3</sup> The word Sovereign, as applied to the reigning king or queen of England, is a mere term of compliment, except when used to express the representative character given by the constitution to the regal head who is clothed with all the insignia of British sovereignty.

Sovereign power is incapable of legal limitation; but considered severally, the members of a sovereign body are in a state of subjection to the body, and may therefore be legally bound, even as members of the body.

A simple illustration may assist in enabling the mind to seize the idea of the *civil*, as distinguished from the *natural* man; the *political*, as distinguished from the *natural* society. Imagine a city standing in a plain; from without, you see its high wall, its battlements, its moat, and its drawbridge; within, its interlacing streets, thronged with a busy populace; its shops and ware-

<sup>1</sup> Austin, p. 226.

<sup>2</sup> *Ib.*, p. 226.

<sup>3</sup> *Vide* p. 54.

houses stored with every product of human industry, ranging from the bare necessities of life to the most fanciful of luxuries. The sentinel at the drawbridge is holding a parley with one, who, from his garb, is an undoubted stranger, both to the city and to city life. He seeks admission, he desires to become a citizen; the request is granted conditionally; he must strip off his warrior dress, lay down his arms, assume the civic garb, and undertake, instead of endeavouring to enforce his claims and wishes by the might of his sinewy arms, to refer all his disputes to the arbitration of the civic judge. He accepts the conditions, and becomes a citizen. Before his acceptance of these conditions, the relationship existing between him and the city was that of independent powers; disputes between the two must have been determined, if at all, by arrangement or by force. By his acceptance of the conditions, he ceased to be independent, and became subject: he gave to the city the power to impose rules or laws upon him, and to punish him for disobedience; he received from the city the right to demand justice—*i. e.*, the same treatment as every other citizen similarly situated—at its hands, whether as against itself, or as against any individual fellow-citizen.

Sovereign or other political powers are either:—

1. Legislative; or 2. Executive or administrative.

The legislative sovereign power of England resides in the Parliament; that is to say, in the tripartite sovereign body formed by the King, the members of the House of Lords, and the members of the House of Commons. The executive sovereign power resides in the King alone, by whom it is exercised either in person or by delegate.<sup>1</sup>

<sup>1</sup> See Austin, p. 255, *et seq.*

Sovereign powers are delegated,—1, Subject to a trust or trusts ; or, 2, Absolutely or unconditionally.

**Governments** are commonly divided into three kinds: 1, Governments *de jure* and *de facto*; 2, Governments *de jure* but not *de facto*; and 3, Governments *de facto* but not *de jure*. The first are existing governments which are deemed lawful. The second, though deemed lawful, are temporarily supplanted or displaced. The third, though at present existing, are deemed unlawful.<sup>1</sup>

‘In most actual societies the sovereign powers are engrossed by a single member of the whole; or are shared exclusively by a few of its members: and even in the actual societies whose governments are esteemed popular, the sovereign number is a slender portion of the entire political community.’<sup>2</sup>

‘In all or most of the governments which are styled limited monarchies, a single individual shares the sovereign powers with an aggregate or aggregates of individuals: the share of that single individual, be it greater or less, surpassing or exceeding the share of any of the other individuals who are also constituent members of the supreme and heterogeneous body.’<sup>3</sup> He is therefore not a monarch, in the proper acceptation of the term; nor is the mixed aristocracy, of which he is the foremost member, a monarchy, properly so called.

By every actual sovereign, whether the sovereign be one individual or a number or aggregate of individuals, some of the *supreme powers* are exercised through political subordinates, or delegates, representing their sovereign author; and in many of the societies whose supreme governments are popular, the sovereign or

<sup>1</sup> Austin, p. 336.

<sup>2</sup> *Ib.* p. 243.

<sup>3</sup> *Ib.* p. 247.

supreme body exercises, through representatives whom it elects and appoints, the whole, or nearly the whole, of its sovereign powers. In our own country, for example, one component part of the sovereign or supreme body is the numerous body of the *Commons*, in the strict signification of the name; that is to say, such of the Commons as share the sovereignty with the King and the Peers, and elect the members of the Commons' House. Now the Commons exercise, through representatives, the whole of their sovereign powers, excepting their sovereign power of electing and appointing representatives to represent them in the British Parliament. So that if the Commons were sovereign without the King and the Peers, not a single sovereign power save those which I have now specified would be exercised by the sovereign directly.'<sup>1</sup>

'**Political or Civil Liberty** is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects; and, since the power of the government is incapable of legal limitation, the government is *legally* free to abridge their political liberty, at its own pleasure or discretion. . . . Persons in a state of nature are independent of political duty, and independence of political duty is one of the essentials of sovereignty. But *political* or *civil* liberty supposes political society, or supposes a *πόλις* or *civitas* : and it is the liberty from legal obligation which is left by a State to its subjects, rather than the liberty from legal obligation, which is inherent in sovereign power. Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is

<sup>1</sup> Austin, pp. 250, 251.

not more worthy of eulogy than political or legal restraint. Political or civil liberty, like political or legal restraint, may be generally useful, or generally pernicious; and it is not as being liberty, but as conducing to the general good, that political or civil liberty is an object deserving applause.<sup>1</sup>

‘If it be objected,’ says Sidney, ‘that I am a defender of arbitrary powers, I confess I cannot comprehend how any society can be established, or subsist, without them. The difference between good and ill government is not, that those of one sort have an arbitrary power which the others have not,—for they all have it,—but that, in those which are well constituted, this power is so placed as that it may be beneficial to the people.’<sup>2</sup>

‘It appeareth plainly,’ says Hobbes, ‘to my understanding, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocraticall commonwealths, is as great as men can be imagined to make it. And though of so unlimited a power men may fancy many evill consequences, yet the consequence of the want of it, which is warre of every man against his neighbour, is much worse. The condition of man in this life shall never be without inconveniences; but there happeneth in no commonwealth any great inconvenience, but which proceeds from the subjects’ disobedience. And whosoever, thinking sovereign power too great, will seek to make it lesse, must subject himself to a power which can limit it: that is to say, to a greater.’<sup>3</sup> ‘One of the opinions,’ says the same writer, ‘which are repugnant to the nature of a commonwealth, is this, that he who hath the sovereign power is subject to the

<sup>1</sup> Austin, p. 281.

<sup>2</sup> *Ib.* p. 286.

<sup>3</sup> Quoted by Austin, p. 286.

civill lawes. It is true that all sovereigns are subject to the lawes of nature; because such lawes be Divine, and cannot by any man, or any commonwealth, be abrogated. But to the civill lawes, or to the lawes which the sovereign maketh, the sovereign is not subject: for if he were subject to the civill lawes, he were subject to himselfe; which were not subjection, but freedom. The opinion now in question, because it setteth the civill lawes above the sovereign, setteth also a judge above him, and a power to punish him: which is to make a new sovereign; and, again, for the same reason, a third to punish the second; and so continually without end, to the confusion and dissolution of the commonwealth.' . . . 'The difference between the kinds or forms of commonwealth, consisteth not in a difference between their powers, but in a difference between their aptitudes to produce the peace and security of the people: which is their end.'<sup>1</sup>

Having distinguished between natural and political societies, having indicated the various forms, external and internal, of political societies, and divided each society into two elements, the sovereign and the subject, we now come to the consideration of the term "Law."

'**A Law**, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being, by an intelligent being having power over him.'<sup>2</sup> In other words, a law is a command which obliges a person or persons.

Laws set by men to men are of two leading or principal classes.—1. Those set by *political* superiors, sovereign and subject: by persons exercising supreme

<sup>1</sup> Quoted by Austin, p. 286.

<sup>2</sup> *Ib.* p. 88.

and subordinate *government*, in independent nations, or independent political societies. 2. Those not set or established by political superiors, or, at least, not in that character or capacity.<sup>1</sup>

A law set or imposed by general opinion is merely the *opinion* or *sentiment* of an *indeterminate* body of persons in regard to a kind of conduct.<sup>2</sup>

A so-called law set by general opinion is not a law in the proper signification of the term. It is not armed with a *sanction*, and does not impose a *duty* (*officium*), in the proper acceptation of the expression. For a sanction, properly so called, is an evil annexed to a command. And duty, properly so called, is an obnoxiousness to evils of the kind.<sup>3</sup>

Laws proper, or properly so called, are *commands*; or rather, laws or rules, properly so called, are a *species* of *commands*.<sup>4</sup>

**Command.**—The term “command” is here used to signify a wish or desire, expressed or intimated by one who has the power and purpose to inflict an evil or pain, in case the desire expressed is disregarded.

The three ideas or notions comprehended by the term *command* are:—1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish, by words or other signs.<sup>5</sup>

Commands are of two kinds: 1. Where the command obliges *generally* to acts or forbearances of a *class*, the command is a LAW or RULE. 2. But where it obliges to a

<sup>1</sup> Austin, p. 89.

<sup>4</sup> *Ib.* p. 90.

<sup>2</sup> *Ib.* p. 188.

<sup>5</sup> *Ib.* p. 94.

<sup>3</sup> *Ib.* p. 189.

*specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular.<sup>1</sup>

**Duty** (*officium, necessitas*).—The person to whom the command is given is said to be *bound* or *obliged* by the command, or to lie under a *duty* to obey it. Command and duty are, therefore, correlative terms; the meaning denoted by each being implied or supposed by the other.<sup>2</sup>

Duties are *relative* or *absolute*. A relative duty is implied by a right to which that duty answers. An absolute duty does not answer, or is not implied by, an answering right. As an example of an absolute duty, may be cited, that to forbear from cruelty to any of the lower animals. For a necessary element of right is wanting. There is no person towards, or in respect of whom, the duty is to be observed.<sup>3</sup>

Duties are *positive* or *negative*. Of duties answering to rights which avail against persons determinate, some are negative, but others, and most, are positive; that is to say, are duties to do or perform. Duties answering to rights which avail against the world at large, are *negative*; that is to say, duties to forbear.<sup>4</sup>

**Obligation.**<sup>5</sup>—In the language of the Roman Law, and of all the modern systems which are off-shoots from the Roman Law, the term “obligation” is restricted to the duties which answer to rights *in personam*.

<sup>1</sup> Austin, p. 95.    <sup>2</sup> *Ib.* p. 91.    <sup>3</sup> *Ib.* p. 67.    <sup>4</sup> *Ib.* p. 46.

<sup>5</sup> *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*

*Omnium autem obligationum summa divisio in duo genera deducitur; namque aut civiles sunt, aut prætoris. Civiles sunt, quæ aut legibus constitutæ, aut certe jure civili comprobatæ sunt. Prætoris sunt, quas prætor ex sua jurisdictione constituit, quæ etiam honorariæ vocantur.*

*Sequens divisio in quatuor species deducitur: aut enim ex contractu sunt, aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio.* Just. Inst. iii. 13 (14).

**The Sanction** is the evil to which the commanded is exposed in case of disobedience. The command or duty is therefore said to be *sanctioned* or *enforced* by the chance of incurring the evil. *Punishments*, strictly so called, are one class of sanctions.

The sanctions annexed to the laws of God are styled *religious*. Those annexed to positive laws, *legal*. And those annexed to moral rules, *moral*.<sup>1</sup>

**Positive Law.**—‘Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign individual or body to a member or members of the independent political society wherein its author is supreme.’<sup>2</sup> In other words, some positive laws are set by the sovereign *immediately*; whilst others are set *mediately*—i.e., are set immediately by subordinate political superiors, or by private persons in pursuance of legal rights. In consequence of this difference between their *immediate* authors, laws are said to emanate from different *sources* or *fountains*.

‘Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds:—1, By monarchs, or sovereign bodies, as supreme political superiors; 2, By men in a state of subjection, as subordinate political superiors; 3, By subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so-called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior; that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command*, and therefore

Austin, p. 200.

<sup>2</sup> *Ib.* p. 339.

<sup>3</sup> *Ib.* p. 35.

flowing from a *determinate* source, every positive law is a law proper, or a law properly so called.<sup>1</sup>

**Laws improperly so called.**—Laws which are not commands are laws improper, or improperly so called. Laws properly so called, with laws improperly so called, may be divided into the four following kinds :—1. The divine laws, or the laws of God; that is to say, the laws which are set by God to his human creatures. 2. Positive laws; that is to say, laws which are simply and strictly so called, and which form the appropriate matter of general and particular jurisprudence. 3. Positive morality, rules of positive morality, or positive moral rules. 4. Laws metaphorical or figurative, or merely metaphorical or figurative.<sup>2</sup>

The law of God, positive law, and positive morality, sometimes coincide, sometimes do not coincide, and sometimes they conflict.

The effect of a law is, then, either to impose an obligation simply, or to create a right with its corresponding obligation. An obligation must be imposed either upon a person or persons; it cannot be imposed upon a *thing*. A law that creates a right, must create the right in, or must confer the right upon, some person or persons; and the right created must avail against either some individual person or persons, or it must avail against persons in general. A right that avails against some particular person or persons, is termed a right *in personam* or *jus in personam*. A right that avails against persons generally, is termed a right *in rem*, or *jus in rem*. This difficulty, therefore, presents itself. To understand the philosophy of rights, we require to be acquainted with the incidents of persons;

<sup>1</sup> Austin, p. 183.      <sup>2</sup> *Ib.* p. 81.

to comprehend the law of persons, we must be familiar with rights. We cannot, except imperfectly, study both together, or indeed either separately; I shall therefore, for the moment, assume the necessary familiarity with persons. The *political man* being the concrete, rights the abstract. And as the notion of a *right* is duplex, whereas that of a *duty* is simple, it is most logical to commence with the latter; and in favour of this course there is the further reason, that the fundamental notion of a law is *duty*; for while there are many laws which merely create duties, there cannot be a law which merely creates a right.

Every law that is not simply *declaratory*,<sup>1</sup> either *prohibits* or *permits*. When the law prohibits, *e. g.*, "Thou shalt do no murder," the subject of the law is in one of two positions—1st, that which he occupies before breaking the law; 2nd, that in which he finds himself, he having violated the law. The first, which we may style his *position of duty*, or *his duty to obey*, was termed by the Romans his *officium* or *necessitas*. The second, his state or condition of liability to punishment, or to make compensation to the injured, which we style guilt, was said, in the language of the Roman Law, to create an *obligatio ex delicto*.

A permissive law renders it lawful, but optional, to do a given thing, *e. g.*, "to contract." In this case, no duty arises till a contract has been made. Upon the making of the contract, the duty arises; but the duty is not imposed by the law which permits contracting, nor is it imposed by the one party upon the other, but it is voluntarily assumed by each party to the contract, and is to perform that which he, in the contract, has

<sup>1</sup> See p. 92.

undertaken to do; nor is it till the one or the other has failed in his self-imposed duty, that an obligation *ex contractu* arises.

There are two other classes of wrongs which create obligations, termed respectively by the Romans, *obligationes quasi ex delicto*, and *obligationes quasi ex contractu*. The former obligation, *quasi ex delicto*, occurs when the injurious act or omission is not a crime—i. e., an act or omission for which the guilty can be punished criminally—but is one for which he may be compelled, at the suit of the injured, to give satisfaction or compensation; such acts or omissions are termed by the English law *torts*. The distinction between obligations *ex contractu* and obligations *quasi ex contractu* does not appear to be recognized by the English law; or perhaps it would be more correct to say, that these terms are not. By the Roman law, an obligation *quasi ex contractu* arose when any person, without convention with another, spontaneously, and presumably for the benefit of the other, assumed the direction of his affairs,—*cum quis negotia absentis gesserit . . . quia non ex maleficio substantiam capiunt, quasi ex contractu (obligationes) nasci videntur*.<sup>1</sup> By the English law, such conduct creates what is termed an *implied contract*.<sup>2</sup>

<sup>1</sup> Just. Inst. iii. 28, 1.

<sup>2</sup> Quasi-delicts are incidents by which *damage* is done to the obligee, though without the negligence or intention of the obligor, and for which damage the obligor is bound to make satisfaction. They are not delicts, because intention or negligence is of the essence of a delict; it being useless to apply a sanction where the will is passive.

The distinction between quasi-contract and quasi-delict seems to be useless. In neither case is there either contract or delict. They are merely arranged under these heads, because there is an obligation (*stricto sensu*), as there would have been if there had been a contract or a delict. (Austin, p. 945.) In the English law, the above terms do not occur; there the obligation is said to arise out of a contract or promise which the law implies. But the fiction is the same. (Austin, p. 945.)

‘**A Crime** or misdeameanor (delict) is an act committed or omitted, in violation of a public law either forbidding or commanding it,’<sup>1</sup> (i.e., in violation of a prohibitory law, such violation entailing *punishment*).

An act or omission is not a crime, or is not imputable to the party, unless the party knew, or with due attention might have known, that, under the circumstances of the fact, it was a crime. Every crime, therefore, supposes on the part of the criminal *criminal knowledge* or *criminal negligence—vel scienter vel negligenter*.<sup>2</sup>

‘The difference between crimes and civil injuries, is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offence which is pursued at the discretion of the injured party or his representative, is a civil injury. An offence which is pursued by the sovereign, or by the subordinates of the sovereign, or, as in England, in the name of the sovereign, is a *crime*.’<sup>3</sup>

An act or omission is not a crime if it be purely involuntary; i.e., if the not doing the act done, or the doing the act omitted, did not depend in any wise on the wish or will of the party.

Generally, an act or omission is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear stronger than the fear naturally inspired by the law.

‘The distinction between private and public wrongs, or civil injuries and crimes, would seem to consist in

<sup>1</sup> Steph. Com. vol. 4, p. 89, Note.

<sup>2</sup> Austin, p. 1092.

<sup>3</sup> Austin, p. 417.

this : Where the wrong is a *civil injury*, the sanction is enforced at the discretion of the party, or his representatives, whose right has been violated. Where the wrong is a *crime*, the sanction is enforced at the discretion of the sovereign. And, accordingly, the same wrong may be private or public, as we take it with reference to one, or to another sanction. Considered as a ground of action on the part of the injured individual,—by the law of England,—an assault or battery is a civil injury. The same battery, considered as a ground for an indictment, is a crime, or public wrong.<sup>1</sup> The same may be said of libel.

‘In all cases of wrongs which are breaches of *absolute duties*, the sanction is enforced at the discretion of the sovereign or state. It is only by the sovereign or state that the liability incurred by the wrong-doer can be remitted.’ ‘The pursuit of criminals resides in this country in the king; or, in a few instances, in the House of Commons; as when it impeaches an alleged offender before the House of Lords.’<sup>2</sup>

‘The Romans classed criminal law and the law of political conditions under the general term *jus publicum*: for, say they, “ad statum rei Romanæ, ad publice utilia spectat;” whereas the remaining matter of the corpus juris is placed under the head *jus privatum*: for, say they, “ad singulorum utilitatem, ad privatum utilia spectat.”’<sup>3</sup>

The only distinction, then, which exists between a civil injury and a crime, is that, in the case of the former, the wrong-doer, *tortfeasor*, may be pursued by the injured for personal satisfaction; in the case of the latter, the wrong-doer, *criminal*, can only be pursued by the

<sup>1</sup> Austin, p. 518.

<sup>2</sup> *Ib.* p. 518.

<sup>3</sup> Just. Inst. 1. 1.

injured in the name of the Crown, in order that punishment may be inflicted upon him by the State.

Bentham divides offences into the four following kinds:—‘1. Private Offences—Those which are injurious to such or such assignable individuals, other than the delinquent himself. 2. Reflective Offences—Those by which the delinquent injures nobody but himself; or, if he injures others, it is only in consequence of the injury done to himself. 3. Semi-public Offences—Those which affect a portion of the community, a district, a particular corporation, a religious sect, a commercial company, or any association of individuals united by some common interest, but forming a circle inferior in extent to that of the community. All such offences consist of a danger which threatens, but which as yet attacks no particular individual. 4. Public Offences—Those which produce some common danger to all the members of the State, or to an indefinite number of non-assignable individuals, although it does not appear that any one in particular is more likely to suffer than any other.’<sup>1</sup>

‘Since,’ he says, ‘the happiness of an individual flows from four sources, the offences which may attack it can be arranged under four divisions:—1. Offences against the person. 2. Offences against property. 3. Offences against reputation. 4. Offences against the condition; that is, against domestic or civil relations, such as the relation of father and child, husband and wife, master and servant, citizen and magistrate, &c.

‘Offences which are injurious in more respects than one may be designated by compound terms; as, offences

<sup>1</sup> Principles of the Penal Code, ch. i.

against the person and property, offences against the person and reputation, &c.’<sup>1</sup>

The distinction attempted to be drawn by some of our legal writers between *malum (quia) prohibitum* and *malum in se*, and that of the Roman lawyers between crimes *juris gentium* and crimes *jure civili*, appears to be unsupported by reason, and is certainly repugnant to the theories of *sovereignty* and *utility*, as already stated, and is practically useless.

**Rights.**—Whenever a legal duty is to be performed *towards* or *in respect of* some determinate person, that person is invested with a right.

All rights are rights to acts or forbearances, either on the part of persons generally, or of particular persons. When we talk of our right to a thing, we mean, if the thing is in our possession, a right to the forbearance of all persons from taking it, or disturbing us in its enjoyment. If it is in the possession of some other person, we mean a right to an act or forbearance of that person—the act of delivering it to us, or the forbearance on his part from detaining it. It is by commanding these acts and forbearances that the law confers the right; and the right, therefore, is essentially and directly a right to these acts or forbearances, and only indirectly to the thing itself.

Every right resides in a person or persons, determinate or certain; meaning by a person determinate, a person determined specifically; and it avails against a person or persons—or answers to a relative duty incumbent on a person or persons—other than the person in whom it resides.

Every legal right is the creature of a positive law;

<sup>1</sup> Penal Code, ch. ii.

and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides. To every legal right there are therefore three parties : 1. The sovereign, who sets the positive law, and who, through the positive law, confers the legal right, and imposes the relative duty. 2. The person or persons on whom the right is conferred. 3. The person or persons on whom the duty is imposed, or to whom the positive law is set or directed. But while, on the one hand, the person or persons on whom the duty is imposed, or to whom the law is set or directed, are necessarily members of the independent political society wherein the author of the law is sovereign or supreme ; the person or persons invested with the right may or may not be.<sup>1</sup>

Again, though every right supposes a correlative obligation,—though the obligation properly constitutes the right,—every obligation does not create a right correlative to it. There are duties or obligations which are not *relative*, but *absolute*. The act commanded is not to be done, or the forbearance observed, towards or in respect to a determinate person ; or, if any, not a person distinct from the agent himself. Such absolute duties comprise,—first, what are called duties respecting oneself. The law may forbid suicide or drunkenness ; but it would not be said, by so doing, to give me a right to my life or health as against myself. Secondly, duties towards persons indefinitely, or towards the sovereign or state, such as the political duties of a citizen, which do not correspond to any right vested in determi-

<sup>1</sup> Austin, p. 290.

nate individuals. Lastly, duties which do not regard persons,—the duty, for instance, of abstaining from cruelty to the lower animals.

Acts, forbearances, and omissions, which are violations of rights or duties, are styled *crimes, delicts, injuries, or offences*.

‘Rights and duties *not* arising from delicts, may be distinguished from rights and duties which are consequences of delicts, by the name of *primary*, or *principal*. Rights and duties arising from delicts, may be distinguished from rights and duties which are *not* consequences of delicts, by the name of *sanctioning*, or *secondary*.’<sup>1</sup>

**Rights in rem.**—‘Rights are of two kinds, *in rem* (jus in rem),<sup>2</sup> and rights *in personam* (jus in personam).

‘The phrase *in rem* denotes the *compass*, and not the subject, of the right. It denotes that the right in question avails against persons generally; and *not* that the right in question is a right over a *thing*.’<sup>3</sup>

‘The phrase *in personam* is an elliptical or abridged expression for “in personam certam sive determinatam.”’<sup>4</sup>

The expression *in rem*, when annexed to the term *right*, does not denote that the right in question is a *right over a thing*. It denotes that the relative duty lies upon persons generally, and is not exclusively incumbent upon a person or persons determinate. In

<sup>1</sup> Austin, p. 44.

<sup>2</sup> The terms “*jus in rem*” and “*jus in personam*” were devised by the civilians of the Middle Ages. ‘Roman jurisprudence did not recognize any general division of rights. That which is now commonly received, however, though not belonging to, was derived from, the Roman Law. We accept this division, because it is exact, provided it is well defined.’—Ortolan, by Prichard and Nasmith, p. 648.

<sup>3</sup> Austin, p. 380.

<sup>4</sup> *Ib.* p. 380.

other words, it denotes that the right in question *avails against the world at large*.<sup>1</sup>

Rights *in rem* are rights residing in persons, and availing against other persons *generally*; or they are rights residing in persons, and answering to duties incumbent upon other persons *generally*.—‘*Facultas homini competens sine respectu ad certam personam*.’<sup>2</sup>

‘Rights *in rem*,’ ‘*jus in re*,’ ‘*jus in rem*,’ ‘*jus reale*,’ ‘*dominium sensu latiore*,’ are synonymous expressions.—‘*Facultas homini competens sine respectu ad certam personam*.’<sup>3</sup>

*Persons the subjects of jus in rem*:—‘Where a *real* right is *over* a person, or where a *personal* right is a right *to* a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds; for the right *resides* in a person or persons distinct from himself, and *avails* against a person or persons also distinct from himself. He therefore is merely the *subject* of the real or personal right, and occupies a position *analogous* to that of a *thing* which is the subject of a similar right.

‘For example, Independently of his right against the child, and independently of his obligations towards the child, the parent has a right *in* the child availing against the world at large. And, considered as the subject of this last mentioned right, the child is placed in a position analogous to that of a *thing*, and might be styled, in respect of that analogy, a *thing*.

‘Again, Independently of his rights against the parent, and independently of his obligations towards the parent, the child has a right *in* the parent, availing against the world at large. The murder of the parent

<sup>1</sup> Austin, p. 48.

<sup>2</sup> *Ib.* p. 381.

<sup>3</sup> *Ib.* p. 964.

by a third person might not only be treated as a *crime*, or *public wrong*, but might also be treated as a *civil injury* against that right in the parent which belongs to the child. By the laws of modern Europe, the civil injury merges in the crime; but in other ages the case was different; the offender lay under a twofold obligation: to suffer punishment on the part of the society or community, and to satisfy the parties whose interest in the deceased he had destroyed. This is the distinction, and the only one, which exists between a civil injury and a crime.<sup>1</sup>

**Rights in personam** are 'Rights residing in persons, and availing *exclusively* against persons specifically determinate: or, Rights residing in persons, and answering to duties which are incumbent *exclusively* on persons specifically determinate.'<sup>2</sup>

The duties which correlate with, or answer to, rights *in rem*, are always *negative*, *i.e.*, they are duties to forbear or abstain; whereas obligations which correlate with rights *in personam* are mostly positive, *i.e.*, obligations to do or perform.<sup>3</sup>

"*Jus ad rem*," as opposed to "*jus in re*," in the modern and extended meaning, is synonymous with "*jus in personam*." It embraces *all* rights which avail against persons certain. It is often, however, used in a manner significative, and restricted to a *species* of those rights.

"*Jus ad rem*," "*jus in personam*," "*jus personale*," "*obligatio*," are synonymous expressions.—'Facultas homini competens *in certam personam*.'<sup>4</sup>

'Rights *in personam*, including the obligations which answer to rights *in personam*, arise from facts or events

<sup>1</sup> Austin, p. 396.

<sup>2</sup> *Ib.* p. 381.

<sup>3</sup> *Ib.* p. 382.

<sup>4</sup> *Ib.* p. 964.

of three distinct natures; namely, from *contracts*, from *quasi-contracts*, and from *delicts*.<sup>1</sup>

‘Rights arising from civil delicts are generally rights *in personam*.’<sup>2</sup>

The subjects or objects of rights are *persons*, *things*, *acts*, and *forbearances*.

**Persons.**—Persons are divisible into three<sup>3</sup> classes:—1, Physical or natural persons; 2, Legal individual

<sup>1</sup> Austin, p. 55.

<sup>2</sup> In the language of the Roman law, the term *delict*, as applied to civil injuries, is commonly limited to civil injuries which are infringements of rights *in rem*. Violations of rights *in personam*, or breaches of contracts and quasi-contracts, are not commonly styled *delicts* or *injuries*, and are not commonly considered in a peculiar or appropriate department. In the institutes of Gaius, as well as in those of Justinian, they are considered with contracts and quasi-contracts, or with the primary rights *in personam*, of which they are infringements. The term *delict* has, however, in Roman law a larger meaning also; being co-extensive with the term *injury*, and signifying any violation of any right or duty. In the language of the English law, the term *delict* is limited to civil injuries which are infringements of rights *in rem*. (Austin, p. 63.)

The term *jus* sometimes means right as opposed to obligation. Sometimes, however, it is used collectively, and denotes right and obligation, or obligation alone. “*Succedere in omne jus defuncti*,” is to succeed to his obligations as well as to his rights. (Austin, p. 957.)

The word “obligation” (*stricto sensu*) has also a double meaning. Sometimes it means the obligation which corresponds with *jus ad rem*; sometimes it means the right of the one party, as well as the obligation of the other. Thus the party who gains a right by a contract is said to acquire an obligation, i.e., a right against the party who is bound by the obligation. (Ib.)

The language of the Roman lawyers stood (nearly) thus:—1. For rights (universally) they had “*jus*”; for rights *in rem* (generally), “*dominium*” (in its loose signification); for rights *in personam*, “*obligatio*.” 2. For obligations or duties (universally) they had “*officium*” and “*necessitas*”; for the special obligations which answer to the rights *in personam*, “*obligatio*.” For the general duties or obligations which answer to rights *in rem*, they had no specific expression. But since obligations of this class were never denoted by “*obligatio*,” and since obligations of the other class were always denoted by it, “*officium*” or “*necessitas*,” when opposed to “*obligatio*,” supplied the defect. (Austin, p. 956.)

<sup>3</sup> Austin (p. 358) divides persons into two classes: physical or natural persons, and legal or fictitious persons. This division is apt to mislead; for, as we have seen, the citizen cannot be described as a physical or natural person.

persons; and 3, Fictitious legal persons. With the first, properly speaking, jurisprudence has no concern, except in the study of their nature as human beings. The persons known to jurisprudence are—the *legal man*, sovereign, subject, or alien; and the fictitious legal persons, or persons who have no existence except in the eye of the law. A person was consequently defined by the Civilians to be “a human being invested with a condition or status,”—*homo cum statu suo consideratus*. Austin,<sup>1</sup> however, relying upon the following and similar passages from the Roman jurists, takes exception to this definition of *person* as too narrow, it excluding all but those vested with or capable of rights. ‘*Summa divisio de jure personarum, hæc est: quod omnes homines aut liberi sunt aut servi.*’ (Just. Inst., 1, 3, 1.) ‘*Sequitur de jure personarum alia divisio. Nam quædam personæ sui juris sunt; quædam alieno juri sunt subjectæ. Sed rursus earum personarum, quæ alieno juri subjectæ sunt, aliæ in potestate, aliæ in manu, aliæ in mancipio sunt. Videamus nunc de iis quæ alieno juri subjectæ sint: ac prius dispiciamus de iis qui in aliena potestate sunt. In potestate itaque sunt servi dominorum.*’ (Gai. Inst., 1, 9, 48—52.) This definition appears, however, to be perfectly consistent with Austin’s own definitions of “sovereignty,” “sovereign,” “subject,” whereas his objection is altogether inconsistent. The Romans, also, are perfectly consistent. They divide *jus* into *jus naturale*, *jus gentium*, and *jus civile*. They say, ‘*Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cælo, quæ in terra, quæ in mari nascuntur.*’ (Just. Inst., 1, 2.) Consequently, when treating of persons, they include all human beings, whom they di-

<sup>1</sup> p. 358.

vide into—1, “*Liberi*,” subdivided into *ingenui* and *libertini*; and 2, “*Servi*,” subdivided into *nascuntur* and *fiunt*.

Though the Romans cannot be charged with inconsistency, it appears equally erroneous to say that their classification is scientific. It must not, however, be forgotten that the Digest and the Institutes are works on Roman Municipal Law, and not on General Jurisprudence—a subject perfectly foreign to the Roman lawyer. The merit of these great works consists in close and logical reasoning from given postulates, not in the soundness of the postulates themselves, nor in the scientific character of their classification.

A physical or natural person is a human being, *not* a member of any political society, one who has *no legal* rights, one who is free from all *legal* obligations. Savages are *physical* or *natural* persons.

Persons are capable of taking rights, and are also capable of incurring duties. But a person, not unfrequently, is merely the *subject* of a right which resides in another person, and avails against third persons; and, considered as the *subject* of a right, and of the corresponding duty, a person is neither invested with a right, nor subject to a duty. Considered as the subject of a right and of the corresponding duty, a person occupies a position analogous to that of a *thing*. Such, for example, is the position of the servant or apprentice, in respect of the master's right to the servant or apprentice against third persons or strangers.

A pure slave is not a person, inasmuch as he has no rights. Being a member of a political society, but not being sovereign or a person, he is a *thing*.

‘Persons may, then, be considered from three points of view:—1, As invested with rights; 2, as lying under

obligations or duties ; 3, as being the subjects or objects of rights and obligations.<sup>1</sup>

The term *person* is, by the Romans, sometimes used to denote the *condition* or *status* with which men are invested. And taking the term in this signification, any human being who has rights and duties may bear a *number* of persons (*personæ*),—*unus homo sustinet plures personas*. For example, every human being who has rights and duties, is a *citizen* or an *alien*; he is also a *son*; probably he is a *husband* and a *father*. It may happen, moreover, that he is *guardian* or *tutor*. His *profession* or *calling* may give him distinctive rights, or may subject him to distinctive duties. And with the various conditions or *status* of citizen, son, husband, father, guardian, advocate, attorney, or trader, he may combine the condition of judge, or of member of the supreme legislature, and so on to infinity.<sup>2</sup>

**Personæ.**—The term "*person*" (*persona*) is equivalent to *character*. It signified, originally, a mask worn by a player, to distinguish the character which he represented from the other characters in the piece. From the mask which expressed the character, it was extended to the character itself. From characters represented by players, or from dramatic characters, it was further extended by a metaphor to conditions, or *status*. For men, as subjects of law, are distinguished by their respective *conditions*; just as players, performing a play, are distinguished by the several *persons* which they respectively enact or sustain.<sup>3</sup>

By the Greek translators of, and commentators on, the Roman Law, "*persona*" is translated by the word *πρόσωπον*, which signifies a visage or face, and is ob-

<sup>1</sup> Austin, p. 362.

<sup>2</sup> *Ib.* p. 362.

<sup>3</sup> *Ib.* p. 363.

viously meant to denote the character, and not individual physical man.<sup>1</sup>

The term *persona* is sometimes used as synonymous with *status*. Austin says,<sup>2</sup>—‘*Jus personarum* did not mean law of persons or rights of persons, but law of *status* or condition. A person is here not a physical or individual person, but the *status* or condition with which he is invested.’ The title of Gaius on this subject is, “De conditione hominum.” Theophilus translates “*jus personarum*” by “ἡ τῶν προσώπων διαίρεσις,” clearly intending the *status*, condition, or character borne by the individual.

Fictitious legal persons are of three kinds:—1st, Some are collections or aggregates of physical persons; 2nd, others are *things*, in the proper signification of the term; 3rd, others are collections or aggregates of rights and duties. The *collegia* of the Roman Law, and the corporations aggregate of the English, are instances of the first; the *prædium dominans* and *serviens* of the Roman Law is an instance of the second; the *hæreditas jacens* of the Roman Law, is an instance of the third.<sup>3</sup>

**Status.**—The word *status* signifies the standing or condition of any individual in the eye of the law of the country in which he for the time being is.

That the word *status* was not, to the Roman legal mind, synonymous, as is too frequently said, with *caput*, appears abundantly clear from a careful examination of the text of the Digest and Institutes. As, however, the word *status* has given rise to considerable discussion, which has occasioned no small perplexity, it may be advisable to make a few observations upon it.

1. I repeat the remark, that the Digest and Institutes

<sup>1</sup> Austin, p. 363.

<sup>2</sup> Ib. p. 374.

<sup>3</sup> Ib. p. 364.

of Justinian are confined to the discussion of Roman municipal law, and consequently that all terms therein employed must be rendered accordingly, unless the immediate context warrants an extended signification. All room for doubt upon this point is removed by the express declaration of the fact, 'quoties non addimus nomen cujus sit civitatis, nostrum jus significamus.' (Inst. 1, 2, 2.) 2. The chapters treating of the same subject matter are respectively entitled in the Digest "De statu hominum" (Dig. 1, v.), and in the Institutes "De jure personarum" (Inst. 1, 3); and in these two chapters we find this classification, 'All men are either freemen or slaves,'—'Summa itaque de jure personarum divisio hæc est: quod omnes homines aut liberi sunt, aut servi.' 3. We meet constantly with such expressions as, 'Est autem capitis diminutio prioris status mutatio,' 'Minima capitis diminutio est, cum civitas retinetur et libertas, sed status hominis commutatur.' From these three facts I draw the following conclusions:—1. That the words "status" and "jus" are used as equivalents to express the legal position and rights of persons. 2. The words "persona" and "homo" are in one sense, viz., in that referred to in the text quoted, used as synonymous. 3. That the word "persona" or "homo" is equally applicable to express a freeman or a slave; and that, as a slave has no legal rights, the term status does not necessarily import a person having legal rights; whereas the term "*caput*" imports the maximum of rights that could be enjoyed by a Roman; a perfect caput necessitating the existence of three distinct elements, *libertas, civitas, familia*.

The caput, or perfect Roman status, consisted of three

elements—citizenship, *civitas*; liberty, *libertas*; and independence, *sui juris*. This status was, however, altered by anything that affected either of these elements. The most serious alteration, styled “*maxima capitis diminutio*,” occurred when he lost both citizenship and liberty; the next inferior alteration, styled “*minor* or *media capitis diminutio*,” occurred when he merely lost his liberty; and the smallest alteration, styled “*minima capitis diminutio*,” when he either passed from the condition of “*alieni juris*” to that of “*sui juris*,” or *vice versâ*. Any one in possession of a *perfect* status was *sui juris*, and enjoyed all the rights of a citizen; he therefore had *civitas*, *libertas*, and various *personæ*; the word *persona* being here used in the secondary meaning of *character*, as explained above.

The text runs as follows:—“*Est autem capitis diminutio prioris status mutatio; eaque tribus modis accidit: nam aut maxima est capitis diminutio, aut minor, aut minima.*”

‘*Maxima capitis diminutio est, cum aliquis simul et civitatem et libertatem amittit; quod accidit his, qui servi pœnæ efficiuntur atrocitate sententiæ; vel libertis, ut ingratis erga patronos condemnatis; vel his, qui se ad pretium participandum venundari passi sunt.*

‘*Minor, sive media, capitis diminutio est, cum civitas quidem amittitur, libertas vero retinetur; quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est.*

‘*Minima capitis diminutio est, cum civitas retinetur et libertas, sed status hominis commutatur; quod accidit his qui, cum sui juris fuerint, cœperunt alieno juri subjecti esse; vel contra, veluti si filius-familias a patre emancipatus fuerit, est capite diminutus.*

*Servus autem manumissus capite non minuitur, quia nullum caput habuit.*

‘Quibus autem *dignitas* magis quam *status* permittitur, *capite* non minuuntur; et ideo, a senatu motos capite non minui constat.’<sup>1</sup> (Just. Inst. 1, 16.)

The number of “*status*” or “aggregates of *personæ*” recognized by a given State, together with the rights and obligations attaching to each, belongs to the province of the constitutional and municipal law of that State; there are, however, certain fundamental notions

<sup>1</sup> Austin says,—‘Of all the perplexing questions which the science of Jurisprudence presents, the notion of *status* or *condition* is incomparably the most difficult. And much of the obscurity in which it is involved, arises from the manner in which it has been treated by the modern commentators upon the Roman law; particularly from their habit of restricting the import of “*status*,” and of using it as if it were equivalent to the narrower expression “*caput*.”’ (Austin, p. 362.)

*Status.* There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*; the rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a *condition* or *status* which the person occupies, or with which the person is invested. One and the same person may be invested with *many* conditions or *status*; e.g., he may at the same time be son, husband, father, guardian, advocate, or trader, member of a sovereign number, and minister of that sovereign body. (Austin, p. 41.)

*Status* and *caput*, as used by the Romans, are not synonymous expressions. The term *caput* signifies certain conditions which are *capital* or principal; which cannot be acquired and cannot be lost, without a mighty and conspicuous change in the legal position of the party. Such, for instance, are the *status libertatis* and the *status civitatis*; that is to say, the condition of the freeman, as opposed to the condition of the slave; and the condition of the citizen or member of the political society, as opposed to the condition of the foreigner. (Austin, p. 361.)

The Law of Persons is that part of the law which relates to *status* or conditions.

The Law of Things, like the Law of Persons, relates to rights and duties, but to rights and duties considered generally and in the abstract; exclusively of the rights and duties which are the constituent elements of conditions or *status*. (Austin, p. 709.) They both relate to rights and duties which reside in or are incumbent upon *men*. Each, therefore, relates to persons in that proper sense of the term, quite as much as the other. (Austin, p. 709, see p. 976; and Ortolan, by Prichard and Nasmith, “*Status*,” p. 568.)

concerning property and contract, in addition to those already noticed, which, being common to all, form the appropriate matter of "general jurisprudence": the chief of which will now be briefly considered.

'**Things** are such *permanent* objects, *not being persons*, as are sensible or perceptible through the senses; or, things are such *permanent* external objects as are not *persons*. Things are opposed, on the one hand, to *persons* themselves; and are contradistinguished, on the other, from the *acts* of the persons, and from the rest of the *transient* objects which are denominated *facts* or *events*.'<sup>1</sup>

Things are *subjects* of rights, and are also *subjects* of the duties to which those rights correspond.

'Things resemble persons in this,—That they are permanent external objects; or objects which are permanent, and sensible or perceptible through the senses. They *differ* from persons in this,—That persons are invested with rights, and subject to obligations; or, at least, are capable of both. Things are essentially incapable of rights or obligations; although, by a fiction, they are sometimes considered as persons, and rights or obligations are ascribed or imputed to them accordingly.'<sup>2</sup>

'Things resemble facts or events in this,—That they are incapable of rights or obligations. They *differ* from facts or events in this,—That things are *permanent* external objects, whilst facts or events are *transient* objects, and consist of determinations of the will, with other affections of the mind; as well as of objects perceptible through the senses.'<sup>3</sup>

The word "*res*," *thing*, is used by the Roman

<sup>1</sup> Austin, p. 368.

<sup>2</sup> *Ib.* p. 368.

<sup>3</sup> *Ib.* p. 368.

lawyers in three distinct meanings. 1. It embraces any permanent external object which may be the subject of a right or duty, and which is not a physical person or a collection of physical persons. 2. It embraces persons considered as the mere subjects of rights, that is to say, considered as the subjects of rights residing in other persons, and availing against third persons. In this sense, a slave is styled a thing. 3. It embraces acts and forbearances considered as the objects of rights and duties; that is to say, acts which are to be done, or forbearances which are to be observed, agreeably to rights or duties. For example, if I am bound by contract to deliver goods, or to refrain from selling goods of a sort to this or that market, the act or forbearance to which I am bound would be styled "res."<sup>1</sup>

'**Ownership or property** (Dominium).—The ownership of property is either *absolute* or *qualified*. The ownership of property is absolute, when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, *subject only to general laws*,'<sup>2</sup>—Dominium est jus utendi, fruendi, et abutendi, quatenus juris ratio patitur.

'Ownership is the right to use or deal with some given subject, in a manner or to an extent which, though it is not unlimited, is indefinite.'<sup>3</sup>

The word "*absolute*," when applied to property, therefore signifies no more than the most extensive right that is allowed by the sovereign to the subject, in or over any given thing. The sovereignty alone possesses unlimited power over the property within the State. The right that may be termed "*absolute*

<sup>1</sup> Austin, p. 802.    <sup>2</sup> U.S. Civil Code, §§ 171, 172,    <sup>3</sup> Austin, p. 382.

*ownership*" may be defined to be, the grant of that measure of sovereign power over a given thing, consistent with sovereign interests; "sovereign interests" being defined to be the general necessities of the State, and the protection of the rights of all individuals. Not merely the property but the life of any subject may, both in law and in reason, be sacrificed when the exigencies of the State demand it; and in order that the rights of others may be preserved, the rights of each must be exercised within due limits. "Sic utere tuo ut alienum non lædas," does not detract from, nor diminish, the right vested in the possessor; it merely defines its limits.

The incidents of ownership are not the same in the different subjects of dominium. They vary, not merely according to the inherent properties of the subject, but according to the character impressed upon it by the sovereignty. The owner of a tree may, if so disposed, destroy it by fire; the owner of land cannot. The owner of a horse may kill, and thus destroy it; but in England he renders himself liable to the criminal law, by cruelty to it: he may, by selling the horse, convert his property in it into money; he may spend the money, but if he clips or destroys the coin, he is in danger of imprisonment.

Ownership or property is, therefore, a *species* of *jus in rem*. For ownership is a right residing in a person *over* or *to* a thing, and *availing against other persons universally or generally*. It is a right implying, and exclusively resting upon, obligations which are at once *universal* and *negative*.

Where the subject of a right *in rem* happens to be a person, the position of the party who is invested with

the right wears a double aspect. He has a right or rights *over* or *to* the subject, as against other persons generally. He has also rights *in personam* against the *subject*, or lies under *obligations* towards the subject.

The terms "owner," "ownership," "dominion," cannot be applied to the authority of one person over another, except in the case of a slave, who is, in fact, not a legal person, but a thing.

'The ownership of property is qualified—1. When it is shared with one or more persons. 2. When the time of enjoyment is deferred or limited. 3. When the use is restricted.'<sup>1</sup>

'**Easement**, *servitus*, is any right which gives to the entitled party such a power or liberty of using or disposing of the subject, as is defined or circumscribed exactly.'<sup>2</sup> 'Unlike the power of user, which is imported by the right of property, it is not *merely* circumscribed by the sum of the entitled person's duties. The uses which he may derive from the subject, or the purposes to which he may apply it, are defined positively, or are susceptible of positive description.'<sup>3</sup>

'*Servitus* is a right *in rem*. For it avails against *all mankind*, including the owner of the subject. It implies an obligation upon all to *forbear* from every act inconsistent with the exercise of the right.

'But this *negative* and *universal* duty is the only obligation which *correlates* with the *jus servitutis*, or which corresponds to that very right. Every *special* obligation which happens to regard or concern it, is, nevertheless, foreign or extraneous to it, and answers to some right in the opposite or antagonistic class.

'Suppose, for example, that the servitude has been  
U.S. Civil Code, § 173.   <sup>2</sup> Austin, p. 822.   <sup>3</sup> Austin, p. 831.

*constituted*, or granted, by the actual owner of the subject. And suppose that the owner has also *contracted* with the grantee *not* to molest him in the enjoyment or exercise of the right. Now, here, the grantor of the servitude lies under *two* duties, which are completely distinct and disparate:—One of them arising from the *grant*, and answering to the right which it creates; the other arising from the *contract* by which he is *specially* bound, and answering to the right *in personam* which the contract vests in the grantee. In case he molest the grantee in the exercise of the servitude, the *injury* is double, though the *act* is single. By one and the same act he violates an *Officium*, which he shares with the rest of mankind, and he also breaks an *Obligation*—in the sense of the Roman lawyers—which arises from his peculiar position.<sup>1</sup>

**Contract.**—The most important branch of civil liberty is the right conferred upon individuals of entering into agreements, by which every form of status and every class of property<sup>2</sup> may be affected; the execution of

<sup>1</sup> Austin, p. 383.

<sup>2</sup> *Capital, property.*—Want and labour spring from the niggardliness of nature, and not from the inequality which is consequent on the institution of property. These evils are inseparable from the condition of man upon earth; and are lightened, not aggravated, by this useful, though invidious institution. Without *capital*, and the arts which depend upon capital, the reward of labour would be far scantier than it is; and capital, with the arts which depend upon it, are creatures of the institution of property. The institution is good for the many, as well as for the few. The poor are not stripped by it of the produce of their labour; but it gives them a part in the enjoyment of wealth which it calls into being. In effect, though not in law, the labourers are co-proprietors with the capitalists who hire their labour. The reward which they get for their labour is principally drawn from *capital* (in other words, the reward which they get for their labour principally results from the labour, combined with frugality, of those who, by the exercise of these virtues, have amassed capital); the labourer is therefore no less interested than the legal owners in protecting the fund from invasion.—Austin, p. 132.

which the sovereign power will enforce at the suit of either party.

The word "agreement" suggests three distinct primary ideas, viz., the *parties*, the *subject matter*, and the *terms*; and one secondary, the *evidence* of the fact of a contract. Without the former, it is obvious that no agreement can exist; without the latter, that no sovereign (judicial) cognizance can be taken of it. The right established, therefore, in all cases, imports *four* elements, viz., legal parties, legal subject matter, legal terms, and legal evidence. It is, however, possible that the enactments of no two states may exactly coincide as to the legal limits of either. The *common* incidents of contract belong to the province of general jurisprudence. Those peculiar to a given system belong to particular jurisprudence, or to the municipal law of the particular State.

I employ the term *contract* to express any agreement that *can* be legally enforced; the term *convention* (illegal, void, voidable, invalid contract, nudum pactum) to express any agreement that *cannot* be legally enforced.

The parties to a contract are, therefore, such as may legally contract, the subject matter of the contract is such as may legally be dealt with, the terms are such as the law sanctions, and the evidence of the contract is such as the law requires. A convention, on the other hand, is defective in one or more of these particulars.

A *Convention* is defined to be a promise given by one, and accepted by another,—promissio ab altero data ab altero accepta; or the consent of two or more to a given thing—duorum vel plurium in idem placitum consensus.

*Mutual Assent.*—The characteristic of every agree-

ment which forms a contract is, that it creates a right in each party to the contract, with a corresponding duty on the other party. The term agreement, therefore, in this sense, must not be confounded with the notion of "yielding assent to a theory or dogma," or the like. Hence, all legal agreements are said to consist of a *promise* and an *acceptance*, or of an offer (pollicitation) and an acceptance. A promise or an offer must be of a definite thing (*factum*) or things, and the acceptance must be of that thing, or of those things; or, as it is technically phrased, the parties to the contract must be at one,—*ad idem*.

'A contract,' says Pothier, 'includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise.' Hence, assent or acceptance is indispensable to the validity of every contract; for, 'as I cannot by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right.' Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract.<sup>1</sup>

A promise is said to bind on account of the expectation excited in the promisee. For which reason, a mere pollicitation, *i. e.*, a promise or offer made, but not accepted, is not binding; for a promise not accepted could excite no expectation. So of a promise obviously made in jest.

<sup>1</sup> Quoted in Smith's Law of Contract, p. 80.

In enforcing contracts, the expectation of both parties must be looked to. Where the terms are expressed in writing, their common agreement, contemplation, expectation—*i. e.*, of the burthen undertaken by the one, and the advantage expected by the other—is to be collected from the writing.<sup>1</sup>

Where language is not employed, the common meaning of the parties is collected from the peculiar facts of the case, and from the consequences attached by the law or usage to contracts of the sort; which consequences the parties must be understood to have contemplated.

*Essence, nature, and accidents of Contracts.*—In treating of the general properties of conventional obligations, Pothier and other jurists distinguish between the *essence*, the *nature*, and the *accidents* of contracts. Those things are of the *essence* of the contract, without which it could not subsist. For instance, there can be no sale without a thing to be sold, and a price; consequently these things are essential to the contract of sale. Things are of the *nature* of the contract which are included in it by the operation of law, without being expressed. Thus, when a thing is sold, it is at the risk of the purchaser, as soon as the contract is completed, before delivery; so that, if it perish without the fault of the seller, the loss falls on the purchaser;<sup>2</sup> and this flows from the nature of the contract of sale. Those things are *accidental* to a contract, which form no part of it unless they are expressed. For example, if the seller agrees to keep the subject sold in repair for a certain time, or to accept payment of the price by

<sup>1</sup> Austin, p. 939.

<sup>2</sup> *Periculum rei venditæ nondum traditæ est emptoris.*

instalments at distant dates, such conditions require to be specifically expressed, seeing they do not flow from the nature of the contract itself.<sup>1</sup>

*Consideration.*—The *offer* or *promise*, on the one hand, constitutes the *consideration* for the acceptance, on the other ; or, reversing the position, the *acceptance*, on the one hand, constitutes the *consideration* for the offer or promise on the other. All contracts are, therefore, said to be based upon, or supported by, a consideration.

The reader will at once perceive that this definition of “consideration” includes the case of a mere promise “*to give or to do an act of kindness*,” when the promisee has accepted the offer or promise ; and as he is aware that no action will lie by a child against his parent, by one friend against another, for the mere non-performance of such a promise, he will feel disposed to reject the definition as defective, nor will he find it difficult to quote authorities in support of his position. He will, however, upon careful examination of the Roman, the English, and, I venture to think, of every other system, be convinced that the definition is accurate, and that the difficulty arises from confining the term *consideration* to that consideration which will support any particular contract. This removes the question, not merely from the province of general, to that of particular, jurisprudence, in order to determine whether the given agreement is in fact, in the particular State, a contract or a mere convention ; but to that portion of the particular jurisprudence which deals with that peculiar class of agreements ; *e. g.*, when applied to the English contract of “*promise of marriage*,” the definition is adequate ; when applied to ordinary English *simple contracts*, it is not.

<sup>1</sup> Pothier, *Traité des Obligations*, part i. ch. 1. art. 1, § 3.

The question, therefore, to be answered in each case is,—What does the law recognise as a consideration capable of supporting the given contract ?

The law of England requires that the consideration capable of supporting a *simple contract* shall be ‘some benefit to the person making the promise, or some loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.’

Sir Wm. Blackstone, following the arrangement of the civilians, divides considerations into four classes : ‘1. *Do ut des*, when I give something that something may be given to me ; 2. *Facio ut facias*, when I do something that something may be done for me ; 3. *Facio ut des*, when I do something that something may be given to me ; 4. *Do ut facias*, when I give something that something may be done for me.’<sup>1</sup>

*Fraud* (dolus<sup>2</sup>). From what has been already said, it is obvious that a promise procured by violence or fraud, that is, deceit practised upon the contracting party, in order to induce him to enter into the agreement, cannot constitute a consideration sufficient to support a contract. When fraud is pleaded as a ground of *nullity*, it must be of such a nature as to have induced the party to enter into the contract—*fraus dans causam contractui*.

The parties legally qualified to contract, the nature and extent of the subject matter of the contract, the legality of the stipulation, and the nature of the solemnities or of the evidence required to establish the contract, together with the proper means of enforcing it,

<sup>1</sup> Blac. Com., vol. ii. p. 444. Step. Blac., vol. ii. p. 59.

<sup>2</sup> Labeo defines dolum malum to be—‘omnem calliditem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam ;’ and this definition is approved by Ulpian (D. 4, 3, 1, 2).

or of seeking redress, necessarily belong to the particular jurisprudence of the place where it is to be litigated.

**Quasi-contracts** are acts done by one man to his own inconvenience for the *advantage* of another, but without the authority of the other, and, consequently, without any promise on the part of the other to indemnify him or reward him for his trouble: *e.g.*, *Negotiorum gestio*, in the Roman; *salvage*, in the English law.

An obligation arises such as *would have arisen*, had the one party contracted to do the act, and the other to indemnify or reward. Hence the incident is called a "quasi-contract"; *i.e.*, an incident, in consequence of which one person is obliged to another, as if a contract had been made between them.

The basis is to *incite to certain useful actions*. If the principle were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward.

The term "quasi-contract" has also a larger import; denoting any incident by which one party obtains an *advantage* he ought not to retain, because the retention would damage another, or by reason of which he ought to indemnify the other. The prominent idea in quasi-contracts seems to be an *undue* advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify.<sup>1</sup>

**Laws Classified.**—We may say that the idea of a State involves two hypotheses,—1st, That it consists of two elements only, the *sovereign* portion and the *subject*

<sup>1</sup> Austin, p. 944.

portion ; and 2nd, That the subject portion has relinquished or exchanged for given *civil* rights all *natural* rights.

In order that the subject may know what his civil rights and duties are, they must be defined. This may be done, either by stating what he must not do, and what he may do, or by simply prohibiting given acts and omissions, and leaving him free as to all others. The first logical division of laws is therefore into *prohibitory* and *permissive*.

Rights and duties being thus defined, it behoves the sovereign power to protect the former and to enforce the latter. To do this, it must indicate the course that is to be pursued by the subject who seeks sovereign aid against the violator of his rights, and the course that will be pursued by the sovereign power against the subject charged with the neglect or violation; or, in other words, rules of *procedure* must be published. Again, that equal justice may be done to the accuser and the accused, a third class of rules must be laid down, determining *what* shall establish the fact of guilt—the *factum probandum*,—and the *way* in which it must be established—the *factum probans* ;—or, in other words, a fourth class of rules—rules of *evidence*—must be published. We thus appear to be justified in saying, that laws are of two classes,<sup>1</sup> *prohibitory* and *permissive*, and that each class has two branches, *substantive* and *adjective*. Substantive laws declare rights. Adjective laws of procedure indicate the mode in

<sup>1</sup> Laws have been divided by Bentham and other writers into two branches, *substantive* (*material, le fonds du droit*) and *adjective* (*formal, la forme*) ; *substantive law* being that which the courts are established to administer, as opposed to *adjective law*, or the rules according to which the substantive law is itself administered.

which the right or duty is to be enforced. Adjective laws of evidence point out, what fact or facts will be received as proof of the fact to be shown.

*Prohibitory laws* forbid the doing or the omission of given acts on the ground of their tendency to prejudice the State.

*Permissive laws* warrant the doing or the omission of acts, the supposition being that the doing of such acts advantages the State.

Prohibitory laws may be subdivided into three classes:—1st, Those concerning which conviction of guilt entails punishment, *e.g.*, in England, murder; 2nd, Where conviction of guilt entails compensation, *e.g.*, smuggling; and 3rd, Where conviction of guilt entails, at the election of the injured, either punishment or compensation, *e.g.*, libel, trespass to the person.

Punishments are of two kinds,—restraint of liberty, *i.e.* imprisonment, and fines.

Permissive laws authorise modifications of *status*, the adoption or assumption of *personæ*, and the making and binding oneself by *contract*. They declare the subject free to become, *e.g.*, a proprietor, a bailee, a husband, or a master; they define these various *personæ*, and attach to each given duties; but while the subject is free to assume the character, having assumed it, he is bound to sustain it according to the terms of the law by which it is regulated.

*Autonomic Laws.*—Another species of laws not made by the supreme legislature, are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. For example, by my will I may impose certain conditions upon devisees or legatees; or, as a father or guardian, I

may prescribe to my child or ward certain conduct, which the Courts of Justice will compel him to follow.<sup>1</sup>

‘A private person cannot be the author of a law; but he may be a party to a transaction, by which transaction, in virtue of a general law made by the legislature, he gives certain *rights* and creates certain obligations.’<sup>2</sup>

Austin divides positive laws into—1. Imperative. 2. Declaratory laws, or laws explaining the import of existing positive law. 3. Laws abrogating or repealing existing positive law. 4. Imperfect laws, or laws of imperfect obligation.

*Public Law.*—The phrase *public law* has at least four or five totally different meanings.<sup>3</sup>

Austin says, ‘Taken in its strict and definite signification, the term public law is confined to that portion of law which is concerned with political *conditions*; that is to say, with the powers, rights, duties, capacities, and incapacities, which are peculiar to political superiors, supreme and subordinate.’<sup>5</sup> In this sense, it is obvious that a large portion of the matter embraced in it is not law, but positive morality or ethical maxims.

The Romans style criminal law and the law of political conditions, *jus publicum*; for, say they, ‘ad statum rei Romanæ, ad publice utilia spectat’: to which they

<sup>1</sup> Austin, p. 540.

<sup>2</sup> *Ib.* p. 541.

<sup>3</sup> *Ib.* p. 105.

<sup>4</sup> *Ib.* p. 781.

<sup>5</sup> *Ib.* p. 770. In this sense it is not unfrequently divided into two portions, *constitutional law* and *administrative law*. *Administrative law* determines the ends and modes to and in which the sovereign powers shall be exercised; shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust. (Austin, p. 73.)

oppose the residue of the law, which they style *jus privatum*; for, say they, ‘*ad singulorum utilitatem, ad privatum utilia spectat.*’

This distinction, however, with the reason assigned for drawing it, is calculated to mislead, by suggesting that the interests of individuals are not identical with those of the state. It tends to foster the error that the commission of civil wrongs is less prejudicial to a state than the commission of criminal offences; and it diverts attention from the study of the more important branch, if indeed the one can, correctly, be said to be more important than the other. If, however, we understand by the proposition, that we may regard a political community in two lights, *first* as a unit, and *secondly* as an aggregate of independent units, we see that every class of law may be ranged more or less accurately under one of two heads, which may with propriety be respectively termed *public* and *private*. To the public law, or that portion of the law specially enacted for the community regarded as a unit, we may refer in every political system:—1, *Constitutional Law*; 2, *Public International Law*; 3, *Military Law*; 4, *Ecclesiastical Law*, *i.e.*, on the supposition of a union between Church and State; 5, *Criminal Law*, *i.e.*, when criminals are prosecuted either by, or in the name of, the state or sovereign, the consequence of conviction being punishment; and 6, *Bankruptcy Law*, the basis of which I take to be the recognition by the State that, under certain circumstances, any citizen may become so hopelessly embarrassed as to render it a social necessity to relieve him from the whole or a portion of his liabilities, and to suspend as to them the machinery of the civil law. Under the head of private law we may place the residue.

**Equity.**<sup>1</sup>—Upon reference to Table No. 2, it will be observed that the term “Equity” does not appear. But as in connection with perhaps every system of Jurisprudence we find either that term or an equivalent, some mention of it here is necessary. We may observe:—1. Every law is, necessarily, *general* or *particular* as to the terms in which it is couched. 2. As the object of every law is to define, or to assist in defining, the limits of the subject’s freedom, it is obvious that, with but comparatively few exceptions, the very essence and merit of a law depends upon the precision of its language. 3. Assuming that the law as it stands to-day is exactly suited to the circumstances and necessities of to-day, and assuming at the same time, what invariable experience has taught us, that all things are mutable, and consequently that circumstances and necessities are constantly varying; and we seem driven to the conclusion that the very fact of a law being exactly suited to to-day creates a presumption that it will not suit the future. 4. In the early stages of every political system—that has not, as did the United States, adopted as it were, bodily the law of some other State—the laws, and cases decided upon those laws, are necessarily few; and consequently the judge, in endeavouring to adjudicate upon the merits of a *novel case*, must either determine it by the *letter* or by the *spirit* of the law. The *letter* of the law may work a hardship by not exactly fitting the case, though the case may strictly be within its spirit. Experience has shown that weak judges prefer to adhere to the *text*,

<sup>1</sup> Vide post “English Municipal Law,” tit. “Equity.”

<sup>2</sup> Auxiliary, or Adjusting Law.

rather than to grapple with *principles*; and as the result, narrow and technical decisions have not unfrequently been piled up, till principle became entirely hidden from view. The unfitness of the institutions of the past to the sentiments and necessities of the present, or the denial of justice, *i.e.* the law of the land, from an overweening regard for what is commonly styled *authority*, appears to have rendered one of two things imperative—the law had to be recast, or certain new judges appointed, with discretionary power to grant relief in cases where the actual law or judicial precedents would work an obvious wrong. All nations have experienced the one; most, it may be presumed, have experienced the other; and some, both. Most, perhaps imbued with the sentiment, “that it is better to bear the ills we have than to fly to others that we know not of,” have resorted, at least in the first instance, to the latter expedient; and while leaving the general body of the law essentially in its integrity, have endeavoured to supplement it with an *adjusting agency*, a species of *legal safety valve*—an Equitable Jurisdiction. Equity judges, however, like Common Law judges, or judges when exercising their Equity functions as distinguished from their Common Law functions, in systems where the same person possesses both, naturally fall into the same course with respect to each. The decisions of to-day become the precedents of to-morrow. In the course of time, the file of precedents grows so formidable, as to leave to the presiding judge of the period nothing but the *name*, and to his court, nothing but the *fiction*. The Equity judge is no less fettered by authority than is his Common Law brother judge. If, in the general opinion of the rulers for the time being, that mass of

authority is wholesome, things are suffered to continue; the judges of either jurisdiction, according to their individual capacity and integrity, administering the law equitably, *i.e.* impartially. If, on the other hand, the mass of authority is regarded as a cumbrous impediment to justice, or as a fertile source of injustice, the two systems are fused. The wheat is sifted from the chaff, and the good codified. In other words, matters are put in train for a repetition of the same career; the only difference is that the start being from a new basis, from a basis resulting from long experience, the changes will be less rapid.

In B.C. 753, Rome started with laws of which we may say that practically we know nothing. Between B.C. 451 and B.C. 449, the then existing laws were codified and drawn up in the form with which we are familiar, and which is known as the Twelve Tables. Between B.C. 449 and B.C. 366, the Patricians and Plebeians carried on the struggle for political equality. In the latter year, the Plebeian triumphed in the election of one of his order to the highest office in the land—the Consulate. In B.C. 301, we find him Pontifex Maximus; and a few years later, in B.C. 286, the Hortensian Law made Plebiscita equally binding upon both orders. Slowly but steadily, during the latter portion of this period, the commercial relations of Rome with other countries had been growing in importance. The Decemvirate, who prepared the Twelve Tables, not having even dreamed of such a state of things, had made no provision for it. Those laws were applicable only to Roman citizens. Consequently, in B.C. 245, it was found necessary to appoint a special judge—the Prætor Peregrinus—to do justice as best he could in disputes between Roman

and Foreigner (*peregrinus*), or between Foreigner and Foreigner when in Rome. From what we can gather, we appear justified in saying that he began by relying upon his *common sense*, or, as the Romans styled it, upon '*The law of nature.*' Decisions based upon that law were styled '*Equity,*' the law of nature making no distinction between Roman and *Peregrinus*. We cannot afford the space to trace the interesting progress of this new law: suffice it to say, that it soon found such favour with the Romans as to make *reputation* for the Twelve Tables their sole security. The *Legis Actiones* gave place to the *Formulæ*. Between A.D. 125 and A.D. 228 (about), the greatest jurists that the world has produced, men who delighted in principle, flourished and died. The shelves and brains of their successors became overloaded with precedents. Finally, in A.D. 529, Justinian published his First Code; in A.D. 532, his *Pandects*; in A.D. 533, his *Institutes*; and in A.D. 534, his Second Code, or that which we now possess, and declared those works alone to be of legal authority. Had not the ruthless barbarians shaken Rome to its very foundations, it is more than probable that, ere this, her legal history would, more or less perfectly, have repeated itself.—The history of one nation is no mean guide to that of others.

In drawing this chapter to a close, I must observe that a complete treatise upon General Jurisprudence would necessitate the lengthy discussion of many subjects not even referred to in this sketch. Indeed, if my suggestion in the first chapter as to the origin of law is tenable, the science of General Jurisprudence must involve the examination of every branch of law, and the distinguishing between the natural and the artificial

principles of each system under consideration. The reader will find, in the work from which I have mainly quoted in this chapter, a rich mine of intellectual wealth; and the more familiar he becomes with the great work of Mr. Austin, the more deeply will he regret that death prevented its being completed as it was commenced.

## CHAPTER III.

OUTLINE OF THE DEVELOPMENT OF THE BRITISH CONSTITUTION, TAKEN CENTURY BY CENTURY, FROM THE ACCESSION OF WILLIAM I. TO THE PRESENT TIME.

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## ELEVENTH CENTURY—1000 to 1099.

*William I.*, 1066 to 1087. *William II.*, 1087 to 1100.

In this chapter I purpose to trace the development of the British Constitution from the accession of William I. to the present time, with the view of determining the relative political positions of the three Estates of the Realm—the King, the Lords, and the Commons. To do this, it is incumbent upon me to indicate the various checks that have been introduced to restrain the arbitrary exercise of power; and to explain the several guarantees by which the liberty of the subject has been secured. Of the various methods of treating the subject as a whole, that adopted appears to me to be the most satisfactory—to divide the period under consideration into the recognised centuries of our era, instead of into reigns. The advantage of this division will readily be recognised by the general reader, and especially by those who have before them my Chronometrical Chart of the History of England.

The laws prevailing in England at the death of

Harold—the 14th of October, A.D. 1066—were the laws commonly called the Laws of Edward the Confessor.<sup>1</sup>

Sir Matthew Hale says, ‘William I., though he is called the Conqueror,’<sup>2</sup> and his attaining the crown here is often in history, and in some records, called *conquestus Angliæ*; yet in truth it was not such a conquest as did, or could alter the laws of the kingdom, or impose laws upon the people *per modum conquestus*, or *jure belli*.’<sup>3</sup> Indeed, William, at his coronation, which took place at Westminster on Christmas Day, A.D. 1066, solemnly declared that he claimed the crown, not *jure belli*, but *jure successionis*.<sup>4</sup>

What, then, were the consequences of the Duke’s success? ‘First, it is certain that William took into his hands all the demesne lands of the Crown, which belonged to Edward the Confessor at the time of his death, and avoided all the dispositions and grants thereof made by Harold, during his short reign. And this might be one great end of his making that noble survey in the fourth year of his reign, called Domesday-read (Domesday Book), thereby to ascertain what were the possessions of the Crown in the time of the Confessor, and those he entirely resumed. And this is the reason why in some of our old books it is said, *ancient demesne* is that which was held by King William the Conqueror; and in others it is said, *ancient demesne* is that which was held by King Edward the Confessor.

Whatever appeared to be the Confessor’s at the time of his death, was assumed by King William into his own possession. Secondly, it is also certain that no person

<sup>1</sup> See chap. v., Municipal Law.

<sup>2</sup> He is said never to have surnamed himself ‘Conqueror’; nor was he ever so styled in any letters patent or grants executed by him.

<sup>3</sup> History of the Common Law of England, p. 94.      <sup>4</sup> Hale, p. 106.

simply and *quatenus* an Englishman, was dispossessed of any of his possessions; consequently their land was not pretended unto, as acquired *jure belli*. Which appears most plainly from the following evidences, viz.:—*First*, that very many of those persons that were possessed of lands in the time of Edward the Confessor, and so returned upon the book of Doomsday, retained the same unto them and their descendants. . . . *Secondly*, we find that in all times, even suddenly after the Conquest, the charters of the ancient Saxon kings *were pleaded and allowed*; and titles made and created by them to lands, liberties, franchises, and regalities, affirmed and adjudged under William I. . . . *Thirdly*, many recoveries were had shortly after this Conquest, as well by heirs as successors, of the seisin of their predecessors before the Conquest.’ . . .

‘But to descend to some particulars. The English persons with whom the Conqueror had to deal were of three kinds, viz.:—*First*, such as adhered to him against Harold the Usurper; and, without all question, those continued the possession of their lands, and their possessions were rather increased by him than any way diminished. *Secondly*, such as adhered to Harold, and opposed the Duke, and fought against him; and doubtless, as to these, the Duke, after his victory, used his power, and dispossessed them of their estates; . . . and, *Thirdly*, such as stood neuter, and meddled not on either side during the controversy. And doubtless, for some time after this great change, many of those suffered very much, and were hardly used in their estates, especially such as were of the more eminent sort.’<sup>1</sup>

<sup>1</sup> Hale, p. 112, *et seq.*

**Feudalism.**—Be that as it may, it is certain that by chaps. 52 and 58 of his Laws, William made Feudalism<sup>1</sup> the rule of land tenure in England, and thereby claimed, as vested in himself, the ultimate ownership of, or sovereign title to, the soil of the country. The only interest of each tenant was thus re-

<sup>1</sup> The three ceremonies involved in the grant of a feud or fief were *homage*, *fealty*, and *investiture*. *Homage*.—The vassal on whom the fief was conferred, kneeling, placed his hands between those of the lord, whom he promised to serve with life, limb, and worldly honour, upon which the lord kissed the vassal upon the cheek. *Fealty* was the oath of fidelity taken by the vassal, either in person or by proxy. It bound him not to divulge the lord's counsel; not to injure, or to suffer to be injured, his person or fortune; not to violate the sanctity of his roof or the honour of his family; to adhere to his lord in battle at all peril to himself; and in the event of the lord being captured, to become his hostage. *Investiture*.—Homage and fealty being completed, the lord put his vassal into *corporeal possession* of the estate, termed *livery of seisin*.

‘The entire number of knights’ fees in England was sixty thousand two hundred and fifteen. The King was called the *lord paramount*, or *suzerain*; and those who held their estates of the Crown, *tenants in capite*. In the case of large properties, the lords granted out some of their land to their retainers, exacting from them the same free service which they were required to render to the sovereign; they always, however, reserved a portion for their own use, which was called their *demesne*, and of which a part was cultivated by their vassals, while the rest of it either was let out to farm, or given to tenants to hold on any other than military service. The persons who received these grants of land, whether on military or other services, were called *sub-vassals*, or under-tenants; and the donor was called a *mesne lord*. Thus, if the King gave a large estate to A, who again carved out a portion of it for B, then A would be both tenant in chief to the King and mesne lord to B; while B would be called *tenant paravail*, because he made avail or profit of the land.

‘Landed property was now chiefly held in England in four ways, which depended on the services that the tenants were required to perform. These services were either free or base; free, if they were deemed honourable, such as serving in war, or paying a sum of money; base, if they were only suited to persons of a servile condition, such as ploughing land, making hedges, and so on. Hence there were—1. Lands held by services free and uncertain, known as tenure by military or knight service. 2. Lands held by services free and certain, known as tenure in free socage. 3. Lands held by services base and certain, known as tenure in villenage socage. 4. Lands held by services base and uncertain, known as tenure in pure villenage.

‘The first kind of tenure was that which formed the most essential element of the feudal system. Besides the three ceremonies already referred to in connection with the transfer of a fief, there were several

duced to a mere *usufructuary* right, termed a *beneficium* or *feudum*. This pretension is obviously consistent only with the theory of absolute monarchy, and is altogether inconsistent with the notion that the sovereignty of this realm is lodged in the Parliament.

The term used in contradistinction to "*feudal*" by

services incident to the holding of these estates. In England they were: 1. *Military service*.—The knight was bound to attend his lord to the wars for forty days in every year, if required. 2. *Aids*.—These were sums of money demanded on three occasions:—(a) To make the eldest son of the lord a knight; (b) to marry his eldest daughter; (c) to ransom his person if taken prisoner. 3. *Relief*.—This was considered one of the greatest grievances of the system in England. It was a payment of one hundred shillings for every knight's fee, in case the heir had attained the age of twenty-one. In the Saxon times there was a kind of relief called a *heriot*; but it differed from the feudal relief in that it was a render of the best beast or other chattel on the death of the tenant, whereas the relief was a money payment made by the successor. 4. *Primer seisin* was a feudal burden required only from tenants in capite, and was in effect an additional relief. 5. *Fines for alienation*.—These were payments which the king's tenants had to make when they wished to alienate their land. 6. *Escheat*.—When, by failure of heirs, the race of the first tenant became extinct, the estate reverted to the original donor or his heirs,—in other words, was escheated. 7. *Forfeiture*.—If a person committed treason or felony he forfeited his land, and his blood was considered to be so corrupted or tainted, that he could transmit no property by descent. 8. *Wardship*.—When the heir was a minor, the lord had possession of the estate, and the custody of his ward, till he came of age; and he appropriated the revenues to his own use. 9. *Marriage*.—This was the right the lord had of disposing of his female ward in marriage when she attained the age of fourteen. If she refused to marry the suitor proposed, the lord continued to enjoy the profits of her estate till she became twenty-one, and then she could not marry without his consent. After the Magna Charta of Henry III., a similar right was claimed with respect to male wards. These two last incidents were chiefly confined to England and Normandy. The right of disposing of the ward in marriage was a source of great emolument to the lords, and was correspondingly oppressive and vexatious to the tenants.

'The system of feudal military service in England was far more favourable to the Crown than that in operation on the Continent. Contrary to the custom on the Continent, every vassal, when he took the oath of fealty to his lord, reserved his fealty to the King. The distinction may be thus illustrated:—In France, if A were the sovereign, B the tenant in capite, and C under-tenant; then if B went to war with A, C would be bound to aid, not A, but B; but in England C would be required to aid A against B.'—(Curtis, School Hist. Eng., p. 75.)

European jurists is "*allodial*," allodial land being land in which a man had the full and entire property; which he held, as the saying is, out and out; whereas, as we have seen, *feudal land* was land which a man held of some other man, from whom or from whose ancestors the holder or his ancestor had received permission to possess and enjoy the fruits merely of the land, and that only upon given terms.

**The Great Council.**—William assisted by his Great Council—'*Commune Concilium Regni*'<sup>1</sup>—enacted the laws, and 'so little opposition was experienced in these assemblies by the early Norman kings, that they gratified their love of pomp, as well as the pride of their barons, by consulting them in every important business. The limits of legislative power were, however, extremely indefinite. New laws, like new taxes,<sup>2</sup> affecting the community, required indeed the sanction of the Great Council, by which it was supposed to be represented; but there was no security for individuals against acts of prerogative.'<sup>3</sup>

**Courts.**—The *Curia Regis* was the supreme court of judicature; the King, and in his absence the Grand

<sup>1</sup> The *Commune Concilium Regni*, or *Aula Regis*, first styled Parliament about A.D. 1246, was composed of the King, Archbishops, Bishops, principal Abbots, and the greater Barons.

<sup>2</sup> The taxes consisted of—From vassals, *Aids*, 1st, on the occasion of the knighting of his eldest son; 2nd, the marriage of his eldest daughter; and 3rd, as ransom in the event of his captivity. These aids, when levied by the Crown, were at the rate of a mark or a pound for every knight's fee. *Escuage* or *Scutage* was a commutation for the personal service of military tenants in war. *Tallages* were pecuniary impositions levied upon the occupants of the demesne lands of the King, and the inhabitants of all royal towns. Inferior lords might, with the King's permission, tallage their own tenants. *Customs* upon imports and exports. *Danegelt*, the ship-money of those times, levied at the King's discretion; the latest instance on record is the 20th of Henry II.

<sup>3</sup> Hallam, *Middle Ages*, vol. ii., p. 322.

Justiciary, was the Chief Justice. The *County Courts* entertained ordinary civil, the *Tourne* ordinary criminal causes. Lords of manors also had their *Courts Baron* or *Manorial Courts*, in which they, either in person or by deputy, adjudicated upon the rights of their tenants, and entertained charges for misdemeanours committed within the manor.

**Religion.**—Romanism was the religion of both king and people, whether Norman or Saxon. In matters of faith, the authority of the Church was unquestioned. Politically and socially, the influence of the priest was enormous; for out of the 62,215 knight's fees, into which the entire kingdom was parcelled, as shown by Domesday Book, no fewer than 28,015 were in the hands of the Church. Till A.D. 1085 the Ecclesiastical and Civil jurisdictions were united.

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TWELFTH CENTURY—1100 to 1199.

*Henry I.*, 1100 to 1135.

*Stephen*, 1135 to 1154.

*Henry II.*, 1154 to 1189.

*Richard I.*, 1189 to 1199.

THE twelfth Century, sometimes called the *fusion period*, or the period during which the hostile elements of the English nation—the Saxon and the Norman—were more or less perfectly blended, witnessed during the struggle between these contending races all the horrors of civil war—desolation and oppression. It dawned and closed with a population of about two millions.

The land tenure was unaltered; the legislature re-

mained the same, but the members of the Council gradually grew more active. No material change took place in either the mode or extent of taxation. The Royal prerogatives, in theory, experienced no diminution; in fact, however, they were restrained by the influences of time, changes of dynasty, and the fusion of the races.

The advances effected during this period were in two different directions. The arrogance of the Church received an important check. The administration of justice was improved.

In 1107, the Bishops were compelled to concede homage to the King. In 1125, the incontinence of the clergy led to the assembling of a Council at Westminster, where their conduct was severely strictured. In 1164, the Constitutions of Clarendon were enacted.

From the time of the separation of the Ecclesiastical from the Civil jurisdiction, the clergy not merely struggled to extend the jurisdiction of the Ecclesiastical Courts by entertaining cases of a purely secular character; but maintained that members of their body, when charged even with the most heinous offences, could only be tried by ecclesiastics, who it may readily be imagined, from false notions of the interests of their order, were prone to conceal, rather than publicly to expose, clerical delinquents. A clerk in Worcestershire, having debauched a gentleman's daughter, afterwards murdered her father. The enormity of the crime led the King to order that the criminal should be given up, so that he might receive condign punishment from the civil magistrate. Becket, however, shut him up in the Bishop's prison, and contended that the severest punishment that could be inflicted on him was de-

gradation; and when the King insisted that, after he was degraded, he should be tried before the ordinary court, the Archbishop maintained that it was unjust that a man should be twice tried for the same offence. Henry thereupon assembled the Bishops, and asked them whether they would submit to the ancient laws and customs of the realm; and they, after some hesitation, expressed their willingness to do so. Accordingly, a Council was convoked at Clarendon in 1164, when the sixteen articles, known as the Constitutions of Clarendon, were drawn up.<sup>1</sup>

<sup>1</sup> They are to the following effect:—1. All suits concerning the advowson and presentation of churches shall be decided in the civil courts. 2. Churches belonging to the King's fee shall not be granted in perpetuity without his consent. 3. Ecclesiastics accused of any crime shall appear before the King's Justice, who shall decide whether the case ought to be tried in the secular or ecclesiastical court; and if the clerk is convicted, or confesses his crime, the Church must not any longer give him protection. 4. No Archbishop, or clergyman of high rank, shall go out of the realm without the King's licence; and then he must give surety that, whilst abroad, he will do nothing to the damage of the King or kingdom. 5. Excommunicated persons shall not be required to do more than give security that they will present themselves to suffer the judgment of the Church, in order to absolution. 6. No layman shall be accused before a Bishop, except by legal witnesses; and if the culprit be of such high rank that no one dares to accuse him, *the Sheriff, on the Bishop's demand, shall swear twelve lawful men of the neighbourhood before the Bishop to declare the truth according to their conscience.* 7. No tenant in chief of the King, nor officer of his household, shall be excommunicated, nor his land put under an interdict, till application has been made to the King, or, in his absence, to his Justiciary, that he may do justice concerning such person. 8. All appeals in spiritual matters shall be carried from the Archdeacon to the Bishop, from the Bishop to the Primate, and from him to the King, and shall be carried no further without the King's consent. 9. If any lawsuit arise between a layman and an ecclesiastic concerning the nature of a fief, *the question shall be decided by the verdict of twelve lawful men, &c.* 10. Any inhabitant of a city, borough, &c., who has been cited before an ecclesiastical court, and has refused to appear, may be placed under an interdict. 11. Archbishops, and other spiritual dignitaries, who hold of the King in chief, shall be regarded as Barons of the realm, and shall possess the privileges and be subjected to the burdens belonging to their rank: they shall be present at the trials at

**The Circuits.**—In 1176, England was divided into six districts and *justices in eyre*, or *itinerant justices* were appointed to make periodic circuits to try all the criminal and civil pleas arising within their respective divisions. This alteration was suggested by the failure of the old system, which had culminated in the existence of a great diversity of laws, customs, rules, and forms of proceeding, and in much injustice consequent upon the ignorance or partiality of the local judges.

**Sworn Recognitors.**—In 1176 sixteen sworn recognitors were substituted for trial by battle, thus laying, according to some authorities, the foundation of the system of Trial by Jury, to which we shall have occasion to refer hereafter.<sup>1</sup> During this century the several functions of the *Aula Regis* were distinguished, and the three separate courts of the King's Bench, *vel curiam coram ipso rege, vel ejus justiciario*, in 1194; the Court of Common Pleas, in 1196; and the Court of Exchequer, variously assigned to 1079, 1135, and 1359, were erected as independent courts.

the King's Court, till judgment proceeds to loss of member or death. 12. Pleas of debt belong to the King's jurisdiction. 13. If a person resist a sentence legally pronounced on him by an ecclesiastical court, the King shall employ his authority in obliging him to make submission. In like manner, if any one resist the King in his judicature, the prelates shall assist the King with their censures in reducing him. 14. Goods forfeited to the King shall not be protected in churches or churchyards. 15. When any archbishopric, bishopric, or royal abbey falls vacant, the King shall enjoy its revenues; and when it is to be filled, he shall send for the principal clergy thereof, and the election shall be made in his chapel, and with his assent, and the advice of such of the prelates as he shall call for that purpose; and the person elected shall do homage and fealty to the King for his temporal possessions, saving his order. 16. No villein shall be ordained as a clerk, without the consent of the lord on whose estate he was born.

The murder of Becket (1170) gave a great advantage to the Church; and the Constitutions became practically inoperative.

<sup>1</sup> Page 141.

Sir Matthew Hale says that Henry II. raised up the municipal laws of the kingdom to a greater perfection, and a more orderly and regular administration, than before. 'It is true,' says he, 'that we have no record of judicial proceedings so ancient as that time, except the *pipe rolls* in the Exchequer, which are only accounts of his revenue. But we need no other evidence hereof than the *tractate* of Granville, which, though perhaps it was not written by that Ranulphus de Granvilla who was Justitiarius Angliæ under Henry II., yet it seems to be wholly written at that time.'<sup>1</sup>

**Population—Classes.**—We remarked that the population of England at the accession of William I. was about 2,000,000, at which figure it stood at the close of this century. The natural increase by birth, and the large influx of Normans, was counterbalanced by the frightful loss of life that attended the struggles between the contending races, and those between the rival supporters of Stephen and Matilda. These two millions may be divided into—1, The nobility and gentry; 2, The remaining freemen, consisting of the *burgesses*, the inhabitants of cities, towns, or boroughs, and those who dwelt in the country, the *socagers*, whose tenure was free, though inferior to knight service, and the *tenant class*, the basis of the English yeomanry. 3, The servi, who, according to the Domesday-book, amounted to 25,000, who were styled by the Normans villeins, and were divided into two classes, *villeins in gross*, in whom their owners had practically the same rights as in their cattle, and *villeins regardant*, who differed from the former in that they were attached to the land, and could only be sold with it.

<sup>1</sup> Hale, p. 168.

## THIRTEENTH CENTURY—1200 to 1299.

*John, 1199 to 1216. Henry III., 1216 to 1272. Edward I., 1272 to 1307.*

THE land tenure remains the same in theory ; time has however added a species of prescriptive right to the titles of the beneficiaries under what can hardly now be called the *new régime*. Estates pass from ancestor to heir as absolute property.

John, one of the vilest of our kings, being implicated in the murder of his nephew Prince Arthur in 1203, was deprived, by the King of France, of Normandy, Anjou, Maine, Touraine, and part of Poitou ; in other words, of the bulk of the continental possessions of our early Norman kings, his predecessors. A fact perhaps not to be regretted, its effect being, according to some of our best historians, to centre the affections of the Anglo-Norman nobles in their English home. The history of the English nation has, indeed, been by some dated from A.D. 1215.

**Magna Charta.**—It was in the year 1215 that the nobles, driven to extreme measures by the flagrant tyranny of the King, presented themselves, headed by Archbishop Langton, in arms before John, and insisted on the liberties and laws of King Edward, and the Charter of Henry I., being confirmed. By procrastination and stratagem John endeavoured to evade the demand, but his manœuvres failed. The day was fixed for him to meet his Barons. It was the 9th of June—the place was Runnymede. The Conference, which was afterwards adjourned till the 15th, was not concluded till Friday, the 19th, when the Royal seal was affixed

to the Magna Charta; the most important clauses of which are<sup>1</sup> :—

‘ 12. No scutage or aid shall be imposed in our kingdom, unless by the general council of our kingdom; except for ransoming our person, making our eldest son a knight, and once for marrying our eldest daughter; and for these there shall be paid a reasonable aid. In like manner it shall be concerning the aids of the city of London. . . . 14. And for

<sup>1</sup> The residue of the Charter runs thus :—

JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Governors, Officers, and to all Bailiffs, and his lieges, greeting. Know ye, that we, in the presence of God, and for the salvation of our soul, and the souls of all our ancestors and heirs, and unto the honour of God and the advancement of Holy Church, and amendment of our Realm, by advice of our venerable Fathers, STEPHEN, Archbishop of Canterbury, Primate of all England and Cardinal of the Holy Roman Church, HENRY, Archbishop of Dublin, WILLIAM of London, PETER of Winchester, JOCKLIN of Bath and Glastonbury, HUGH of Lincoln, WALTER of Worcester, WILLIAM of Coventry, BENEDICT of Rochester, Bishops; of Master PANDULPH, Sub-Deacon and Familiar of our Lord the Pope, Brother AYMERIC, Master of the Knights-Templars in England; and of the Noble Persons, WILLIAM MARESCHALL, Earl of Pembroke, WILLIAM, Earl of Salisbury, WILLIAM, Earl of Warren, WILLIAM, Earl of Arundel, ALAN DE GALLOWAY, Constable of Scotland, WARIN FITZ GERALD, PETER FITZ HERBERT, and HUBERT DE BURGH, Seneschal of Poitou, HUGH DE NEVILLE, MATTHEW FITZ HERBERT, THOMAS BASSET, ALAN BASSET, PHILIP OF ALBINEY, ROBERT DE ROPPELL, JOHN MARESCHALL, JOHN FITZ HUGH, and others our liegemen, have, in the first place, granted to God, and by this our present Charter confirmed, for us and our heirs for ever :

1. That the Church of England shall be free, and have her whole rights, and her liberties inviolable; and we will have them so observed, that it may appear thence that the freedom of elections, which is reckoned chief and indispensable to the English Church, and which we granted and confirmed by our Charter, and obtained the confirmation of the same from our Lord the Pope Innocent III., before the discord between us and our barons, was granted of mere free will; which Charter we shall observe, and we do will it to be faithfully observed by our heirs for ever. 2. We also have granted to all the freemen of our kingdom, for us and for our heirs for ever, all the

holding the general council of the kingdom concerning the assessment of aids, except in the three cases aforesaid, and for the assessing of scutages, we shall cause to be summoned the archbishops, bishops, abbots, earls, and greater barons of the realm, singly, by our letters. And furthermore we shall cause to be

underwritten liberties, to be had and holden by them and their heirs, of us and our heirs for ever: If any of our earls, or barons, or others, who hold of us in chief by military service, shall die, and at the time of his death his heir shall be of full age, and owes a relief, he shall have his inheritance by the ancient relief; that is to say, the heir or heirs of an earl, for a whole earldom, by a hundred pounds; the heir or heirs of a baron, for a whole barony, by a hundred pounds; the heir or heirs of a knight, for a whole knight's fee, by a hundred shillings at most; and whoever oweth less shall give less, according to the ancient custom of fees. 3. But if the heir of any such shall be under age, and shall be in ward when he comes of age, he shall have his inheritance without relief and without fine. 4. The keeper of the land of such an heir being under age, shall take of the land of the heir none but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods; and if we commit the custody of any such lands to the sheriff, or any other who is answerable to us for the issues of the land, and he shall make destruction and waste of the lands which he hath in custody, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall answer for the issues to us, or to him to whom we shall assign them: and if we sell or give to any one the custody of any such lands, and he therein make destruction or waste, he shall lose the same custody, which shall be committed to two lawful and discreet men of that fee, who shall in like manner answer to us as aforesaid. 5. But the keeper, so long as he shall have the custody of the land, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the land, out of the issues of the same land; and shall deliver to the heir, when he comes of full age, his whole land, stocked with ploughs and carriages, according as the time of wainage shall require, and the issues of the land can reasonably bear. 6. Heirs shall be married without disparagement, and so that before matrimony shall be contracted, those who are near in blood to the heir shall have notice. 7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage and inheritance; nor shall she give anything for her dower, or her marriage, or her inheritance, which her husband and she held at the day of his death; and she may remain in the mansion house of her husband forty days after his death, within which term her dower shall be assigned. 8. No widow shall be distrained to marry herself, so long as she has a mind to live without a husband; but yet she shall

summoned generally, by our sheriffs and bailiffs, all others who hold of us in chief, for a certain day, that is to say, forty days before their meeting at least, and to a certain place; and in all letters of such summons we will declare the cause of such summons. And summons being thus made, the business of the day shall

give security that she will not marry without our assent, if she hold of us; or without the consent of the lord of whom she holds, if she hold of another. 9. Neither we nor our bailiffs shall seize any land or rent for any debt so long as the chattels of the debtor are sufficient to pay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor shall fail in the payment of the debt, not having wherewithal to pay it, then the sureties shall answer the debt; and if they will they shall have the lands and rents of the debtor, until they shall be satisfied for the debt which they paid for him, unless the principal debtor can show himself acquitted thereof against the said sureties. 10. If any one have borrowed anything of the Jews, more or less, and die before the debt be satisfied, there shall be no interest paid for that debt, so long as the heir is under age, of whomsoever he may hold; and if the debt falls into our hands, we will only take the chattel mentioned in the deed. 11. And if any one shall die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if the deceased left children under age, they shall have necessities provided for them, according to the tenement of the deceased; and out of the residue the debt shall be paid, saving however the service due to the lords; and in like manner shall it be done touching debts due to others than the Jews. . . . 13. And the City of London shall have all its ancient liberties and free customs, as well by land as by water: furthermore we will and grant, that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs. . . . 15. We will not for the future grant to any one that he may take aid of his own free tenants, unless to ransom his body, and to make his eldest son a knight, and once to marry his eldest daughter; and for this there shall be only paid a reasonable aid. 16. No man shall be distrained to perform more service for a knight's fee, or other free tenement, than is due from thence. . . . 19. And if any matters cannot be determined on the day appointed for holding the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid, shall stay to decide them, as is necessary, according as there is more or less business. 20. A freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime, according to the heinousness of it, saving to him his contenance; and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his wainage, if he falls under our mercy; and none of the

proceed on the day appointed, according to the advice of such as shall be present, although all that were summoned come not. . . . 17. Common Pleas shall not follow our Court, but shall be holden in some place certain. . . . 18. Assizes of novel disseisin, and of mort d'ancestor, and of darrein presentment, shall not

aforesaid amerçiements shall be assessed but by the oath of honest men in the neighbourhood. 21. Earls and barons shall not be amerced, but by their peers, and after the degree of the offence. 22. No ecclesiastical person shall be amerced for his lay tenement, but according to the proportion of the others aforesaid, and not according to the value of his ecclesiastical benefice. 23. Neither a town nor any tenant shall be distrained to make bridges or banks, unless that anciently and of right they are bound to do it. 24. No sheriff, constable, coroner, or other our bailiffs, shall hold pleas of the Crown. 25. All counties, hundreds, wapentakes, and tythings, shall stand at the old rents, without any increase, except in our demesne manors. 26. If any one holding of us a lay-fee die, and the sheriff, or our bailiffs, show our letters patent of summons for debt which the dead man did owe to us, it shall be lawful for the sheriff or our bailiff to attach and inroll the chattels of the dead, found upon his lay-fee, to the value of the debt, by the view of lawful men, so as nothing be removed until our whole clear debt be paid; and the rest shall be left to the executors to fulfil the testament of the dead, and if there be nothing due from him to us, all the chattels shall go to the use of the dead, saving to his wife and children their reasonable shares. 27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest relations and friends, by view of the church; saving to every one his debts which the deceased owed to him. 28. No constable or bailiff of ours shall take corn or other chattels of any man, unless he presently give him money for it, or hath respite of payment by the good-will of seller. 29. No constable shall distrain any knight to give money for castle guard, if he himself will do it in his person, or by another able man in case he cannot do it through any reasonable cause. And if we lead him, or send him in an army, he shall be free from such guard for the time he shall be in the army by our command. 30. No sheriff or bailiff of ours, or any other, shall take horses or carts of any freeman for carriage, but by the good-will of the said freeman. 31. Neither shall we nor our bailiffs take any man's timber for our castles or other uses, unless by the consent of the owner of the timber. 32. We will retain the lands of those convicted of felony only one year and a day, and then they shall be delivered to the lord of the fee. 33. All wears for the time to come shall be put down in the rivers of Thames and Medway, and throughout all England, except upon the sea-coast. 34. The writ which is called *precipe*, for the future, shall not be made out to any one, of any tenement, whereby a freeman may lose his court. 35. There

be taken but in their proper counties, and after this manner: We, or, if we should be out of the realm, our Chief Justiciary, shall send two Justiciaries through every county four times a year, who, with four knights, chosen out of every shire by the people, shall hold the said assizes, in the county, on the day, and at the place

shall be one measure of wine and one of ale through our whole realm; and one measure of corn, that is to say, the London quarter; and one breadth of dyed cloth, and russets, and haberjeets, that is to say, two ells within the lists; and it shall be of weights as it is of measures. 36. Nothing from henceforth shall be given or taken for a writ of inquisition of life or limb, but it shall be granted freely, and not denied. 37. If any do hold of us by fee-farm, or by socage, or by burgage, and he hold also lands of any other by knight's service, we will not have the custody of the heir or land, which is holden of another man's fee by reason of that fee-farm, socage, or burgage; neither will we have the custody of such fee-farm, socage or burgage, except knight's service was due to us out of the same fee-farm. We will not have the custody of an heir, nor of any land which he holds of another by knight's service, by reason of any petty serjeanty that holds of us, by the service of paying a knife, an arrow, or the like. 38. No bailiff from henceforth shall put any man to his law upon his own bare saying, without credible witnesses to prove it. . . . 42. It shall be lawful, for the time to come, for any one to go out of our kingdom, and return safely and securely, by land or by water, saving his allegiance to us; unless in time of war, by some short space, for the common benefit of the realm, except prisoners and outlaws, according to the law of the land, and people in war with us, and merchants who shall be in such condition as is above mentioned. 43. If any man hold of any escheat, as of the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which be in our hands, and are baronies, and die, his heir shall give no other relief, and perform no other service to us, than he would to the baron, if it were in the baron's hand; we will hold it after the same manner as the baron held it. 44. Those men who dwell without the forest, from henceforth shall not come before our justiciaries of the forest, upon common summons, but such as are impleaded, or are pledges for any that are attached for something concerning the forest. 45. We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it. 46. All barons who have founded abbeys, and have the kings of England's charters of advowson, or the ancient tenure thereof, shall have the keeping of them when vacant, as they ought to have. 47. All forests that have been made forests in our time, shall forthwith be disforested; and the same shall be done with the banks that have been fenced in by us in our time. 48. All evil customs concerning forests, warrens, foresters and warreners, sheriffs and their officers,

appointed. . . . 39. *Nullus liber homo capiatur, vel imprisonetur, aut utlagetur, aut exuletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.* 40. *Nulli vendemus, nulli negabimus, aut differemus rectum aut iustitiam.* 39. *No*

rivers and their keepers, shall forthwith be inquired into in each county, by twelve sworn knights of the same shire, chosen by creditable persons of the same county; and within forty days after the inquest, be utterly abolished, so as never to be restored; so as we are first acquainted therewith, or our justiciary, if we should not be in England. 49. We will immediately give up all hostages and writings delivered unto us by our English subjects, as securities for their keeping the peace, and yielding us faithful service. 50. We will entirely remove from our bailiwicks the relations of Gerard de Atheyes, so that for the future they shall have no bailiwick in England; we will also remove Engelard de Cygony, Andrew, Peter, and Gyon, from the Chancery; Gyon de Cygony, Geoffrey de Martyn, and his brothers, Philip Mark and his brothers, and his nephew, Geoffrey, and their whole retinue. 51. As soon as peace is restored, we will send out of the kingdom all foreign soldiers, cross-bowmen, and stipendiaries, who are come with horses and arms to the prejudice of our people. 52. If any one has been dispossessed or deprived by us, without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him; and if any dispute arise upon this head, let the matter be decided by the five-and-twenty barons hereafter mentioned, for the preservation of the peace. As for all those things of which any person has, without the legal judgment of his peers, been dispossessed or deprived, either by King Henry our father, or our brother King Richard, and which we have in our hands, or are possessed by others, and we are bound to warrant and make good, we shall have a respite till the term usually allowed the crusaders; excepting those things about which there is a plea depending, or whereof an inquest hath been made, by our order, before we undertook the crusade, but when we return from our pilgrimage, or if perchance we tarry at home and do not make our pilgrimage, we will immediately cause full justice to be administered therein. 53. The same respite we shall have (and in the same manner about administering justice, disafforesting the forests, or letting them continue) for disafforesting the forests, which Henry our father, and our brother Richard, have afforested; and for the keeping of the lands which are in another's fee, in the same manner as we have hitherto enjoyed those wardships, by reason of a fee held of us by knight's service; and for the abbeyes founded in any other fee than our own, in which the lord of the fee says he has a right; and when we return from our pilgrimage, or if we tarry

*freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land. 40. We will sell to no man, we will not deny to any man, either justice or right. . . . 41. All mer-*

at home, and do not make our pilgrimage, we will immediately do full justice to all the complainants in this behalf. 54. No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband. 55. All unjust and illegal fines made by us, and all amerciaments imposed unjustly and contrary to the law of the land, shall be entirely given up, or else be left to the decision of the five-and-twenty barons hereafter mentioned for the preservation of the peace, or of the major part of them, together with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and others whom he shall think fit to take along with him; and if he cannot be present, the business shall notwithstanding go on without him; but so that if one or more of the aforesaid five-and-twenty barons be plaintiffs in the same cause, they shall be set aside as to what concerns this particular affair, and others be chosen in their room, out of the said five-and-twenty, and sworn by the rest to decide the matter. 56. If we have disseised or dispossessed the Welsh of any lands, liberties, or other things, without the legal judgment of their peers, either in England or in Wales, they shall be immediately restored to them; and if any dispute arise upon this head, the matter shall be determined in the marche by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, for tenements of the marche according to the law of the marche; the same shall the Welsh do to us and our subjects. 57. As for all those things of which a Welshman hath, without the legal judgment of his peers, been disseised or deprived of by King Henry our father, or our brother King Richard, and which we either have in our hands, or others are possessed of, and we are obliged to warrant it, we shall have a respite till the time generally allowed the crusaders; excepting those things about which a suit is depending, or whereof an inquest has been made by our order, before we undertook the crusade: but when we return, or if we stay at home without performing our pilgrimage, we will immediately do them full justice, according to the laws of the Welsh and of the parts before mentioned. 58. We will without delay dismiss the son of Llewellyn, and all the Welsh hostages, and release them from the engagements they have entered into with us for the preservation of the peace. 59. We will treat with Alexander, King of Scots, concerning the restoring his sisters and hostages, and his right and liberties, in the same form and manner as we shall do to the rest of our barons of England; unless by

chants shall have safe and secure conduct, to go out of, and to come into England, and to stay there and to pass as well by land as by water, for buying and selling by the ancient and allowed customs, without any evil tolls; except in time of war, or when they are of any nation at war with us. And if there be found any

the charters which we have from his father, William, late King of Scots, it ought to be otherwise; and this shall be left to the determination of his peers in our court. 60. All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, towards our people of our kingdom, as well clergy as laity shall observe, as far as they are concerned, towards their dependents. 61. And whereas, for the honour of God and the amendment of our kingdom, and for the better quieting the discord that has arisen between us and our barons, we have granted all these things aforesaid; willing to render them firm and lasting, we do give and grant our subjects the under-written security, namely that the barons may choose five-and-twenty barons of the kingdom, whom they think convenient; who shall take care, with all their might, to hold and observe, and cause to be observed, the peace and liberties we have granted them, and by this our present charter confirmed; so that if we, our justiciary, our bailiffs, or any of our officers, shall in any circumstance fail in the performance of them, towards any person, or shall break through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm, and laying open the grievance, shall petition to have it redressed without delay: and if it be not redressed by us, or if we should chance to be out of the realm, if it should not be redressed by our justiciary, within forty days, reckoning from the time it has been notified to us or to our justiciary, (if we should be out of the realm,) the four barons aforesaid shall lay the cause before the rest of the five-and-twenty barons; and the said five-and-twenty barons, together with the community of the whole kingdom, shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure; saving harmless our own person, and the persons of our queen and children; and when it is redressed, they shall obey us as before. And any person whatsoever in the kingdom, may swear that he will obey the order of the five-and-twenty barons aforesaid, in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we give public and free liberty to any one that shall please to swear to this, and never will hinder any person from taking the same oath. 62. As for all those of our subjects who will not, of their own accord,

such in our land, in the beginning of the war, they shall be attached without damage to their bodies or goods, until it be known unto us, or our Chief Justiciary, how our merchants be treated in the nation at war with us; and if ours be safe there, the others shall be safe in our dominions.

swear to join the five-and-twenty barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid. And if any one of the five-and-twenty barons dies, or goes out of the kingdom, or is hindered any other way from carrying the things aforesaid into execution, the rest of the said five-and-twenty barons may choose another in his room, at their discretion, who shall be sworn in like manner as the rest. In all things that are committed to the execution of these five-and-twenty barons, if, when they are all assembled together, they should happen to disagree about any matter, and some of them, when summoned, will not, or cannot, come, whatever is agreed upon, or enjoined, by the major part of those that are present, shall be reputed as firm and valid as if all the five-and-twenty had given their consent; and the aforesaid five-and-twenty shall swear, that all the premises they shall faithfully observe, and cause with all their power to be observed. And we will not, by ourselves, or by any other, procure anything whereby any of these concessions and liberties may be revoked or lessened; and if any such thing be obtained, let it be null and void; neither shall we ever make use of it, either by ourselves or any other. And all the ill will, indignations, and rancours that have arisen between us and our subjects, of the clergy and laity, from the first breaking out of the dissensions between us, we do fully remit and forgive: moreover all trespasses occasioned by the said dissensions, from Easter in the fifteenth year of our reign, till the restoration of peace and tranquillity, we hereby entirely remit to all, both clergy and laity, and as far as in us lies do fully forgive. We have, moreover, caused to be made for them the letters patent testimonial of Stephen, lord archbishop of Canterbury, Henry, lord archbishop of Dublin, and the bishops aforesaid, as also of master Pandulph, for the security and concessions aforesaid. 63. Wherefore we will and firmly enjoin, that the Church of England be free, and that all the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, truly and peaceably, freely and quietly, fully and wholly to themselves and their heirs, of us and our heirs, in all things and places, for ever, as is aforesaid. It is also sworn, as well on our part as on the part of the barons, that all the things aforesaid shall be observed *bonâ fide* and without evil subtilty. Given under our hand, in the presence of the witnesses above named, and many others, in the meadow called Runingmede, between Windsor and Staines, the 15th day of June, in the 17th year of our reign.

By two writs, one of the 4th and one of the 9th of Henry III.,<sup>1</sup> it appears that subsidies granted in the Great Council were assessed by knights freely chosen in the County Court, instead of, as heretofore, by the Justices upon their circuits. It was in this reign that military services were commuted for a tax, known as *scutage*, and in the 20th year of this reign we have the last instance of the levy of *Danegelt*.<sup>2</sup>

In 1258, a Council or Parliament was held at Oxford, where the nobles, headed by the King's brother-in-law, Simon de Montfort, met, accompanied by their military retainers. Indignant at the long course of mismanagement from which the kingdom had suffered, they determined, if possible, to take effective means to check it. This "Mad Parliament," as it is called, passed the Provisions of Oxford, or the Oxford Statutes; by which Magna Charta was confirmed, marriages of wards with aliens restrained, and other grievances denounced. It provided that all the offices of state and the fortresses of the kingdom should be held by natives; and that twenty-four persons should be appointed to secure the faithful execution of the laws: twelve to be chosen on the barons' side, and the same number on behalf of the King, to be responsible to a Parliament to be assembled three times a year, and at which were to attend four knights, chosen by the freeholders of each county, who were to inquire into grievances within their district, and deliver their inquisition to Parliament.

<sup>1</sup> Brady's Introduction, Appendix, pp. 41—44.

<sup>2</sup> Danegelt, Danegeld, or Danegold.—A tribute of 1s., and afterwards of 2s. upon every hide of land through the realm, laid upon our ancestors by the Anglo-Saxons, for maintaining such a number of forces as were thought sufficient to clear the British seas of Danish pirates, who greatly annoyed our coasts. (Wharton's Law Lexicon.)

**Parliament.**—The title *Parliament*, which had previously designated any kind of conference, was for the first time applied by the old chronicler to the Great Council summoned in 1246. It ultimately became restricted to that assembly.

**Burgesses enter Parliament.**—Simon de Montfort was the first statesman who perceived, and fully appreciated, the growing importance of the commercial middle classes of England. The instances sometimes asserted of borough representation before his time are both scanty and spurious; but to the Parliament summoned by him in Henry's name, after the battle of Lewes, 1264, *two burgesses* were returned for every borough in each county. The writs for their returns are still preserved. De Montfort soon perished in the vicissitudes of civil war; but his reform measure perished not with him. The victorious Royalists felt the policy of enfranchising the trading community of the land, and Parliaments continued to be summoned on De Montfort's plan.<sup>1</sup>

**Confirmatio Chartarum.**—In 1297, the 25th of Edward I., *Magna Charta*, which had already been solemnly confirmed upwards of thirty times, was, by the Statute usually called "*Confirmatio Chartarum*," re-enacted with important additions. These additions made the presence of the burgesses in the Parliament indispensable.

This confirmation, the material portions of which are as follows, was solemnly made by the King in 1300:—

'Cap. 5. And for so much as divers people of our realm are in fear that the aids and tasks which they have given to us beforetime, towards our wars and other business, of their own grant and good will (how-

<sup>1</sup> Creasy, *Eng. Constitution*, p. 194.

soever they were made), might turn to a bondage to them and their heirs, because they might be at another time found on the rolls, and likewise for the prises taken throughout the realm, in our name, by our Ministers; we have granted, for us and our heirs, that we shall not draw such aids, tasks, nor prises, into a custom for anything that hath been done heretofore, be it by roll or any other precedent that may be founden.

‘Cap. 6. Moreover, we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of Holy Church, as also to earls, barons, and to all the commonalty of the land, that for no business from henceforth we shall take such manner of aids, tasks, nor prises, but by the common consent of all the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.’

‘Edward I.,’ says Sir Matthew Hale, ‘is well styled our ENGLISH JUSTINIAN; for in his time the law, *quasi per saltum*, obtained a very great perfection. . . . I think I may safely say, all the ages since his time have not done so much, in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign, especially about the first thirteen years thereof.

‘Indeed, many penal statutes and provisions, in relation to the peace and good government of the kingdom, have been since made. But, as touching the common administration of justice between party and party, and accommodating of the rules and of the methods and orders of proceeding, he did the most at least of any king since William I., and left the same as a fixed and stable

rule and order of proceeding, very little differing from that which we now hold and practise, especially as to the substance and principal contexture thereof.

‘It would be the business of a volume to set down all the particulars, and therefore I shall only give some short observations touching the same. 1. He perfectly settled the Great Charter and *Charta de Foresta*, not only by a practice consonant to them, in the distribution of law and right, but also by that solemn Act passed 25 Ed. I., and styled *Confirmationes Chartarum*. 2. He established and distributed the several jurisdictions of courts within their proper bounds. And because this head has several branches, I shall subdivide the same, viz.:—(1) He checked the encroachments and insolences of the Pope and the clergy by the *Statute of Carlisle*. (2) He declared the limits and bounds of the ecclesiastical jurisdiction by the *Statutes of Circumspecte agatis* and *Articuli Cleri*. For note, though this latter statute was not published till Edward II., yet it was compiled in the beginning of Edward I. (3) He established the limits of the Court of Common Pleas, perfectly performing the direction of *Magna Charta*, “*quod communia placita non sequantur curia nostra*,” in relation to B. R. (the King’s Bench), and in express terms extending it to the Court of Exchequer by the *Statute of Articuli super Chartas*, cap. 4. It is true, upon my first reading of the *Placita de banco* of Edward I., I found very many appeals of death, of rape, and of robbery therein; and therefore I doubted whether the same were not held, at least by writ, in the Common Pleas’ Court; but upon better inquiry, I found many of the records before Justices Itinerant were entered or filled up among the records of the Common Pleas, which might occasion

that mistake. (4) He established the extent of the jurisdiction of the Steward and Marshal. *Vide Articuli super chartas*, cap. 3. And (5) he also settled the bounds of inferior courts, not only of Counties, Hundreds, and Courts Baron, which he kept within their proper and narrow bounds for the reasons given before; and so gradually the common justice of the kingdom came to be administered by men knowing in the laws, and conversant in the great Courts of B. R. and C. B. (Common Bench), and before Justices Itinerant; but also, by that excellent Statute of *Westminster*, 1, cap. 35, he kept the courts of great men within their limits, under several penalties, wherein ordinarily very great encroachments and oppressions were exercised.

‘The third general observation I make is, he did not only explain, but excellently enforced, *Magna Charta*, by the Statute *De tallagio non concedendo*, 34 Ed. I.

‘4. He provided against the interruption of the common justice of the kingdom, which had too commonly been affected by mandates under the Great Seal or Privy Seal. This he did by the statute of *Articuli super chartas*, cap. 6, which interruptions, notwithstanding *Magna Charta*, had formerly been frequent in use.

‘5. He settled the forms, solemnities, and efficacies of fines, confining them to the Common Pleas and to Justices Itinerant; and appointed the place where they brought the records after their circuits; whereby one common repository might be kept of assurances of lands, which he did by the statute *De modo levandi fines*, 18 Ed. I.

‘6. He settled that great and orderly method for the safety and preservation of the peace of the kingdom, and suppressing of robberies, by the statute of *Winton*.

‘7. He settled the method of tenures, to prevent multiplicity of penalties, which grew to a great inconvenience, and remedied it by the statute of *Quia emptores terrarum*, 18 Ed. I.

‘8. He settled a speedier way for recovery of debts, not only for merchants and tradesmen, by the statute of *Acton Burnel* and *De mercatoribus*, but also for other persons, by granting an execution for a moiety of the lands by *Elegit*.

‘9. He made effectual provision for recovery of advowsons and presentations to churches, which was before infinitely lame and defective, by statute *Westminster 2*, cap. 1.

‘10. He made that great alteration in estates, from what they were formerly, by statute *Westminster 2*, cap. 1, whereby *Estates of fee-simple, conditional at Common Law*, were turned into *Estates-tail*, not removable from the issue by the ordinary methods of alienation. Upon this statute, and for the qualifications hereof, are the superstructures built of 4 Hen. I. cap. 32, 32 Hen. VIII., and 33 Hen. VIII.

‘11. He introduced quite a new method, both in the laws of Wales, and in the metho of their dispensation, by the statute of *Rutland*.

‘12. In brief, partly by the learning and experience of his judges, and partly by his own wise interposition, he silently and without noise abrogated many ill and inconvenient usages, both in his courts of justice and in the country. He rectified and set in order the method of collecting his revenue in the Exchequer, and removed obsolete and illeivable parts thereof out of charge; and by the statutes of *Westminster 1* and *Westminster 2*, *Gloucester* and *Westminster 3*, and of *Arti-*

*culi super chartas*, he did remove almost all that was either grievous or impractical out of the law, and of the course of its administration; and substituted such apt, short, pithy, and effectual remedies and provisions, as by the length of time, and the experience had of their convenience, have stood ever since without any great alteration; and are now, as it were, incorporated into and become a part of the Common Law itself.

‘Upon the whole matter, it appears that the very scheme, mould, and model of the Common Law, especially in relation to the administration of common justice between party and party, as it was highly rectified and set in a much better light and order by this king than his predecessors left it to him, so in a very great measure it has continued the same in all succeeding ages to this day (1676).<sup>1</sup> So that the mark, or epocha, we are to take for the true stating of the law of England, what it is, is to be considered, stated, and estimated from what it was when this king left it. Before his time, it was, in a great measure, rude and unpolished in comparison of what it was after his reduction thereof. And on the other side, as it was thus polished and ordered by him, so has it stood hitherto without any great or considerable alteration, abating some few additions and alterations which succeeding times have made, which for the most part are in the subject-matter of the laws themselves, and not so much in the rules, methods, or ways of its administration.

‘As I before observed some of those many great accessions to the perfection of the law under this king, so

<sup>1</sup> Sir Matthew Hale, born 1609, died in 1676. His “History of the Common Law of England,” from which this passage is extracted, was not published till after his death.

I shall now observe some of those boxes or repositories where they may be found, which are of the following kinds, viz.:—

‘First, the *Acts of Parliament* in the time of this king; which are full of excellent wisdom and perspicuity, yet brevity. But of this enough before is said.

‘Secondly, the judicial records in the time of this king. I shall not mention those of the *Chancery*, the *Closet-patent*, and *Charter-rolls*, which yet will very much evidence the learning and judgment of that time; but I shall mention the *Rolls of judicial proceedings*, especially those in the King’s Bench and Common Pleas, and in the Eyres. I have read over many of them, and do generally observe,—

‘1. That they are written in an excellent hand.

‘2. That the pleading is very short, but very clear and perspicuous; neither loose nor uncertain, nor perplexing the matter either with impropriety, obscurity, or multiplicity of words. They are clearly and orderly digested, effectually representing the business that they intend.

‘3. That the title and the reason of the law upon which they proceed (which many times is expressly delivered upon the record itself) is perspicuous, clear, and rational. So that their *short and pithy pleadings and judgments* do far better render the sense of the business, and the reasons thereof, than those long, intricate, perplexed, and formal pleadings that oftentimes, of late, are *unnecessarily* used.

‘Thirdly, the reports of the terms and years of this King’s time, a few broken cases whereof are in Fitzherbert’s Abridgment. But we have no successive terms or years thereof, but only ancient manu-

scripts, perchance, not running through the whole time of this King. Yet they are *very good*, but *very brief*. Either the Judges then spoke less, or the reporters were not so ready-handed as to take all they said. Hence this brevity makes them the more obscure. But yet in those brief interlocutions between the Judge and the pleaders, and in their definitions, there appears a great deal of learning and judgment. Some of these reports, though broken, yet the best of their kind, are in Lincoln's-Inn Library.

'Fourthly, the tracts written or collected in the time of this wise and excellent prince, which seem to be of two kinds; viz., such as were only the *tractates* of private men, and therefore had no greater authority than private collections, yet contain much of the law then in use, as *Fleta*, the *Mirror*, *Britton*, and *Thornton*; or else, secondly, they were sums, or abstracts of some particular parts of the law, as *Novæ Narrationes*, *Magna et Parva*, *Qadit Assisa summa*, *De Bastardid summa*; by all which, compared even with Bracton, there appears a growth and a perfecting of the law into a greater regularity and order.

'And thus much shall serve for the several periods, or growths, of the Common Law, until the time of Edward I. inclusively. Wherein having been somewhat prolix, I shall be the briefer in what follows, especially seeing that, from this time downwards, the books and reports printed give a full account of the ensuing progress of the law.'<sup>1</sup>

This high and perhaps just encomium, inserted here instead of in the chapter on Municipal Law, as assisting

<sup>1</sup> Hale, p. 190 *et seq*

to throw great light upon this period of our political and social as well as legal history, must not however be suffered to divert attention from the fact that Edward was himself guilty of many arbitrary and violent measures, and that he was far from scrupulous as to the means by which he secured the funds required for his wars. The details of his doings in this respect will be found in Guizot's "History of Representative Government," and in Blackstone's "Introduction to the Charter," as well as in our ordinary histories. There is also no doubt that some of the most important of his measures, so far from originating with, were forced upon, the King. He has been called the *English Justinian*: it may perhaps with equal fairness be said of him, as of his namesake, that the credit of the good measures of his reign is mainly due to the wisdom, the justice, and the patriotism of the leading men of the period.

We may appropriately dismiss this important century with the following quotation from Hallam:—"From the reign of Henry III., at least, the *legal* equality of all ranks of freemen below the peerage was, for every essential purpose, as complete as at present. . . . What is most particular is that the peerage itself imparts no privilege except to its actual possessor. The sons of peers are commoners, and totally destitute of any legal right beyond a barren precedence."<sup>1</sup>

<sup>1</sup> Middle Ages, vol. ii. p. 346.

## FOURTEENTH CENTURY—1300 to 1399.

*Edward I.*, 1272 to 1307.      *Edward II.*, 1307 to 1327.  
*Edward III.*, 1327 to 1377.      *Richard II.*, 1377 to 1399.

**Parliament—Separate Houses.**—Parliament consists of the King; the Lords—Temporal and Spiritual; and the Commons—Knights of Shires and Burgesses.

Do the Commons sit with the Lords?<sup>1</sup> Hitherto, the usual object of calling a Parliament was to impose taxes; and these, for many years after the introduction of the Commons, were laid in different proportions upon the three estates of the realm. Thus, in the 23rd Edward I., the earls, barons, and knights gave the King an eleventh, the clergy a tenth; while he obtained a seventh from the citizens and burgesses. In the twenty-fourth year of the same reign, the two former of these orders gave a twelfth, the last an eighth. These distinct grants imply distinct grantors; for it is not to be imagined that the Commons intermeddled in those affecting the Lords, or the Lords in those of the Commons. Carte<sup>2</sup> fixes the 17th of Edward III. as the date of the separate existence of the two Houses. Hallam, however, gives as proof of a prior separate existence, the fact, amongst others, that in the 11th Edward I., while the Upper House sat at Shrewsbury, the Lower sat at Acton Burnell; he is also of opinion that

<sup>1</sup> "The principle of Two Houses," or the "*Bicameral System*," as it has been phrased by Jeremy Bentham, has been exhaustively argued by Kent, Story, Lieber, Bowyer, and others, who prove it to be the essential guarantee for orderly and permanent liberty. See Creasy, p. 198.

<sup>2</sup> Parliamentary History, vol. i. p. 234.

the Rolls of Parliament of the 8th, 9th, and 19th years of Edward II. furnish evidence that the Houses were then divided as at present.<sup>1</sup> It is generally admitted that such was the case, at least in 1343.

**De tallagio non concedendo.**—In 1305, the "Statutum de tallagio non concedendo"<sup>2</sup> was enacted. It provides that no tallage or aid shall be laid or levied by the King or his heirs in this realm without the goodwill and assent of the archbishops, bishops, earls, barons, knights, and other the freemen of the commonalty of this realm.

Notwithstanding this enactment, it is clear, from the petition<sup>3</sup> addressed by the Commons to Edward II. in 1309, that the people were still subject to serious grievances. From the fact, however, that the Commons granted the King the twenty-fifth penny of their goods *upon this condition, that the King should take advice, and grant redress upon certain articles, wherein they were*

<sup>1</sup> Middle Ages, iii. p. 37.

<sup>2</sup> Blackstone, in his work on the Charters, says this statute was originally nothing more than an intended compendium of the Confirmatio Chartarum.

<sup>3</sup> "The good people of the kingdom who are come hither to Parliament, pray our lord the King, that he will, if it please him, have regard to his poor subjects, who are much aggrieved by reason that they are not governed as they should be, especially as to the articles of the Great Charter; and for this, if it please him, they pray remedy. Besides which, they pray their lord the King to hear what has long aggrieved his people, and still does so from day to day, on the part of those who call themselves his officers, and to amend it, if he pleases." The articles, eleven in number, are to the following purport:—1. That the King's purveyors seize great quantities of victuals without payment. 2. That new customs are set on wine, cloth, and other imports. 3. That the current coin is not so good as formerly. 4, 5. That the steward and marshal enlarge their jurisdiction beyond measure, to the oppression of the people. 6. That the Commons find none to receive petitions addressed to the Council. 7. That the collectors of the King's dues (pernours des prises) in towns and at fairs take more than is lawful. 8. That men are delayed in their civil suits by writs of protection. 9. That felons escape punishment by procuring charters of pardon. 10. That the constables of the King's castles take cognizance

*aggrieved*, it appears that they were alive to their rights and conscious of possessing the means of making them secure.

**Laws**—*Consent of whom required.*—In 1322, it was declared that the consent of the King, the Prelates, the Barons, and the Commonalty is required to make or alter any law affecting the King and the realm.

**Parliament**—*Sittings of.*—By 4th Edward III. c. 14, it was enacted, 'It is accorded that Parliaments shall be holden every year, once or more often, if need be;' and by 36th Edward III. c. 10, 'that a Parliament be holden every year, if need be.'

During the long and prosperous reign of Edward III., three essential principles of our Government may be said to have been established upon a firm footing:—

1st. That the levying of taxes without the consent of Parliament is illegal.<sup>1</sup>

2nd. That the law cannot be altered without the consent of the King, the Lords, and the Commons.

3rd. That it is the right of the Commons to enquire into public abuses, and to impeach public counsellors.

'Laws were now declared to be made *by* the King,

of Common Pleas. 11. That the King's escheators oust men of lands held by good title, under pretence of an inquest of office."

'These articles display in a short compass the nature of those grievances which existed under almost all the princes of the Plantagenet dynasty, and are spread over the Rolls of Parliament for more than a century after this time. Edward gave the amplest assurances of putting an end to them all, except in one instance, the augmented customs on imports, to which he answered, rather evasively, that he would take them off till he should perceive whether himself and his people derived advantage from so doing, and act thereupon as he should be advised. Accordingly, the next year, he issued writs to collect these new customs again. But the Lords' Ordainers superseded the writs, having entirely abrogated all illegal impositions.' (*Middle Ages*, vol. iii. p. 40.)

<sup>1</sup> See Hallam, *Middle Ages*. vol. iii. p. 42, *et seq.*

at the *request* of the Commons, and by the *assent* of the Lords and Prelates.<sup>1</sup>

It was a very common answer to a petition of the Commons, in the early part of this reign, that the petition could not be granted without making a new law. After the Parliament of 14th Edward III., a certain number of prelates, barons, and counsellors, with twelve knights and six burgesses, were appointed to sit from day to day in order to turn such *petitions and answers* as were fit to be perpetual into a *statute*; but for such as were of a temporary nature, the King issued his letters patent. This reluctance to innovate without necessity, and to swell the number of laws which all were bound to know and obey with an accumulation of transitory enactments, led apparently to the distinction between *statutes* and *ordinances*.<sup>2</sup> A distinction which is very obscure, and perhaps no precise and uniform principle can be laid down about it.<sup>3</sup>

**Impeachment.**—The rapid growth of the confidence and influence of the Commons is the most remarkable feature of the lengthy reign of Edward III. In 1336, the advice of Parliament was courted by the King as to the expediency of levying war upon Philip of France. In 1348, Parliament refused to give further advice concerning the war. In 1352, the Commons began to take the initiative in popular power. In 1375, no fewer than forty-eight Sessions of Parliament were held during the year. In 1376, the Commons impeached the lords Latimer and Nevil, together with four commoners, the King's adherents. The three particular grievances alleged, being:—1, The removal of the staple from Calais, where it had been fixed by Parlia-

<sup>1</sup> Middle Ages, iii. p. 48.

<sup>2</sup> Middle Ages, iii. p. 49.

<sup>3</sup> Middle Ages, iii. p. 51.

ment; 2, The participation of these persons in lending money to the king at exorbitant usury; and 3, Their purchasing at a low rate, for their own benefit, old debts from the Crown, the whole of which they had afterwards induced the King to repay to themselves.

For about thirty years, dating from 1337, when he laid claim to the throne of France, Edward's heart was in the battle-field. To secure the support of his Parliament, he gave ready ear to those of their wishes that did not interfere with his cherished project; but when the glories of Crecy and Neville's Cross in 1346, the capture of Calais in 1347, the splendour of Poitiers in 1356, the honourable self-humiliation of John of France in 1363, were succeeded by the decline of his fortunes abroad, he suffered his fame to be tarnished by weakly yielding to the unwholesome influence of Alice Perrers and the Duke of Lancaster. 'The pretended right of levying money without consent of Parliament expired with Edward III., who had asserted it in the very last year of his reign. A great Council of Lords and Prelates, summoned in the second year of his successor, declared that they could advise no remedy for the King's necessities without laying taxes on the people, which could only be granted in Parliament.'<sup>1</sup>

'The reign of Richard II.,' says Hallam, 'is, in a constitutional light, the most interesting part of our early history; and it has been the most imperfectly written.'<sup>2</sup> The growth of the Commons, so conspicuous during the reign of Edward III., continued its unabated development till about the year 1389, when Richard declared himself of age, and dismissed Gloucester from his Council. During this period the Commons had as-

<sup>1</sup> Middle Ages, iii. p. 84.

<sup>2</sup> Middle Ages, iii. p. 81.

sumed the right of *directing the application of subsidies*,<sup>1</sup> and of calling accountants before them; and following the precedents furnished in 1376, had confirmed *the right of impeaching* the King's ministers for misconduct.<sup>2</sup> And indeed, such during this period was the firmness of their attitude, and the boldness of their language, that it is difficult to comprehend their subsequent abject servility otherwise than upon the assumption, fully justified by the history of the two succeeding centuries, that they leaned far more upon the nobles for support, in their struggle with the Crown, than it has been the habit of historians to represent; and that, in fact, without that support, they felt themselves unable successfully to carry on the contest. Be that as it may, of this there is no doubt, that it was not till the nobles were divided and distracted by rival factions, till several of their foremost men had been undone, that Richard succeeded in making "*the royal will the only law*," and in packing a House of Commons, whose sole aim appeared to have been the abnegation of all dignity and self-respect. There is a limit to British endurance, a point beyond which the most accomplished tyrants have never been able to go in this country. Richard reached that point, and fell. Henry of Lancaster, the cousin he had banished, landed at Ravenspur, on the 4th of July, 1399. Nobles and commoners flocked to his standard, and left that of Richard deserted. At Flint Castle, where Richard soon found himself a prisoner, Henry told his cousin that he had come before his time, since the people complained that they had been rigorously ruled for 20 years, and that if it pleased God he would help him to govern them better. Thirty-three articles of

<sup>1</sup> See Middle Ages, iii. p. 58, *et seq.*    <sup>2</sup> See Middle Ages, iii. p. 68, *et seq.*

impeachment were drawn against Richard. Parliament voted his deposition.<sup>1</sup> The throne was declared vacant. Henry was crowned on the 30th of September, 1399.

It may here be mentioned that, in 1362, legal proceedings were required to be thenceforth in English, instead of, as formerly, in French. It was in this century that Wickliffe (1324—1384) directed public attention to matters of religion, that Chaucer (1328—1400) excited a taste for letters, and turned to ridicule the follies of the priesthood.

#### FIFTEENTH CENTURY—1400 to 1499.

*Henry IV.*, 1399 to 1413.      *Henry V.*, 1413 to 1422.  
*Henry VI.*, 1422 to 1461.      *Edward IV.*, 1461 to 1483.  
*Edward V.*, 1483, from *April 9th to June 26th.*  
*Richard III.*, 1483 to 1485.      *Henry VII.*, 1485 to 1509.

THE fifteenth century, the most memorable in the world's history, as being remarkable for the invention of printing,<sup>2</sup> and the discovery by Columbus of America in 1492, overhung the annals of our land with a dark cloud. It opened upon England with one of those acts which, more than all others, have disgraced man's intelligence and humanity—persecution for religious conviction. The Statute Book of the year 1401 is

<sup>1</sup> See *Middle Ages*, vol. iii. p. 83.

<sup>2</sup> Guttenberg, a native of Mentz, is said to have first conceived the idea of printing from moveable letters about the year 1440. The first book printed in England, in English, was "The Game and Playe of the Chesse," printed by Caxton in 1474.

disfigured by the *De hæretico comburendo*.<sup>1</sup> And when its course was half run, the horrors of civil war deluged the land with the blood of the contending Roses, and left it the spiritless prey of Tudor tyranny. The reign, however, of Henry IV. is, from the constitutional point of view, satisfactory. Greater liberty of speech was enjoyed by the Commons during this than in any previous reign.

In maintaining the exclusive right of taxation; in directing and checking the public expenditure; in making supplies depend upon the redress of grievances; in securing the people against illegal ordinances and interpolations of the statutes; in controlling the royal administration; in punishing bad ministers; and in establishing their own immunities and privileges;—the Parliaments of the House of Lancaster (1399—1461) were, upon the whole, worthy to follow their best predecessors.

The first open clash between the two Houses occurred in 1406. It appears that the King having discussed with the Lords the condition of the country, the Lords promised a tax at a given rate. This fact was reported, by the order of the King, to the Commons, who forthwith sent to him a deputy protesting against the proceeding as an infringement of their liberties; whereupon the King 'wills and grants and declares, by the advice and consent of the said Lords, as follows: To wit, that it shall be *lawful for the Lords*

<sup>1</sup> This statute is in Latin—unusual in the laws of the period. In a subsequent petition of the Commons, this act is styled 'the statute made in the second year of your Majesty's reign, at the request of the prelates and clergy of your kingdom.' This affords a presumption that it had no regular assent of Parliament. (Hallam's *Middle Ages*, vol. iii. p. 90.)

*to debate together* in this present Parliament, and in every other for time to come, *in the King's absence*, concerning the condition of the kingdom, and the remedies necessary for it; and, in like manner, it shall be *lawful for the Commons*, on their part, *to debate together* concerning the said condition and remedies: Provided always that neither the Lords on their part, nor the Commons on theirs, do make any report to our said Lord the King of *any grant granted by the Commons, and agreed to by the Lords*, nor of the communications of the said grant, before that the said Lords and Commons are of one accord and agreement in this matter, and then in manner and form accustomed—that is to say, by the mouth of the Speaker of the said Commons for the time being.’<sup>1</sup>

**First Disfranchisement Act.**—During the reigns of Henry V. and Henry VI., public attention was turned to the quality of electors and their representatives. In 1413, it was enacted that burgesses must be freemen. Statutes (repealed by 14 Geo. III. c. 58) of both reigns required electors to be resident in the place voted for; and the year 1429 affords us the first instance of a Disfranchisement Act. Voters for knights of the shires are by it required to possess freehold of the value of at least 40s.

**Bills substituted for Petitions.**—But by far the most important advance of this period was the substitution of Bills for Petitions. ‘Perhaps,’ says Hallam, ‘the triple division of our Legislature may be dated from this innovation.’<sup>2</sup> Hitherto the desire of the Commons had been expressed in the form of a petition;

<sup>1</sup> For the remainder of this record, see *Middle Ages*, vol. iii. p. 103.

<sup>2</sup> *Middle Ages*, vol. iii. p. 92.

and, upon the King's consent being given, or, more correctly, his grant of the desired concession being made, it devolved upon the proper officers, from the petition and answer, to draw up the statute. These officers, however, not unfrequently so detracted from or added to the terms of the petition, as to render the statute worthless. After numerous complaints and barren promises,<sup>1</sup> the Commons devised an effectual means of removing the evil—the substitution of complete statutes, called *bills*, for the old *petitions*. These bills the King was called upon either to admit or reject without qualification. This alteration materially affected the character of our Constitution.

**Benevolences.**—In order to obtain more ample funds than Parliament was disposed to grant, several of our

<sup>1</sup> As an illustration, I quote the following:—'Oure sovereign lord, youre humble and trewe lieges that ben come for the comune of youre lond bysechyn onto youre rizt ritzwesnesse, That so as hit hath ever be thair libte and fredom, that thar sholde no statut ne lawe be made offlasse than they yaf therto their assent; consideringe that the comune of youre lond, the whiche that is, and ever hath be, a membre of youre parlemente, ben as well assenters as petitioners, that fro this tyme foreward, by compleynthe of the comune of any myschief axknyge remedie by mouthe of their speker for the comune, other ellys by petition writen, that ther never be no lawe made theruppon, and engrossed as statut and lawe, nother by addicions, nother by diminucions, by no manner of terme ne termes, the whiche that sholde chaunge the sentence, and the entente asked by the speker mouthe, or the petitions before said yeven up yn writyng by the manere for said, withoute assent of the for said comune. Consideringe, oure sovereign lord, that it is not in no wyse the entente of youre comunes, zif yet be so that they axke you by spekyng, or by writyng, two thynges or thre, or as manye as theym lust: But that ever it stande in the fredom of youre his regalie, to graunte whiche of thoo that you lust, and to werene the remanent. The kyng of his grace especial graunteth that fro hensforth nothyng be enacted to the petitions of his comune that be contrarie of hir askyng, wharby they shuld be bounde withoute their assent. Savyng alwey to our liege lord his real prerogatif, to graunte and denye what him lust of their petitions and askynges aforesaid.' (Rot. Parl., vol. iv., p. 22.) 'This is the earliest instance of the adoption by the House of Commons of the English language.' (Hallam's Middle Ages, vol. iii. p. 90.)

Kings had, from time to time, adopted the expedient of calling upon individuals or communities for the advance of given sums of money, under the name of *loans*. Edward IV. was the first who, under the style of *benevolences* (1474), took his subjects' money without the consent of Parliament. To the desolation and demoralization attending civil war must be ascribed both the possibility of this flagrant violation of the now long-established law of the land, and the silence of Parliament, not merely as to this, but other instances of tyranny. No complaints appear in the Parliamentary records of his reign. One extract from the address presented to Richard, when invited, in 1483, to take the throne, is however sufficient to satisfy us that, if silent, the nation was not insensible to its wrongs:—'For certainly we be determined rather to aventure and committe us to the perille of owre lyfs and jopardie of deth, than to lyve in such thraldome and bondage as we have lyved long tyme heretofore, oppressed and injured by extortions and newe impositions ayenst the lawes of God and man, and the libertie, old policie, and lawes of this realme, whereyn every Englishman is inherited.'<sup>1</sup>

In 1483, Benevolences were declared illegal by the first and only Parliament of Richard III. This Act of Parliament was the first drawn up in English.

**The Star-Chamber.**<sup>2</sup>—This institution originated

<sup>1</sup> Rot. Parl., vol. vi. p. 241.

<sup>2</sup> 'The Court of Star-Chamber, as the old Court of the King's *Concilium Ordinarium* was now called, exercised an extensive and anomalous jurisdiction, by means of which men were arbitrarily fined and imprisoned, and often sentenced to cruel mutilations, for any alleged misconduct which the lords and prelates of the Council, or any Minister of the Crown, might think fit to impute to them. Thus, too, the money of individual subjects was frequently extorted without Parliamentary assent, under the name of *benevolences* or *loans*.' (Creasy, p. 275.)

with Henry VII. in 1486, and was abolished by the Long Parliament in 1641. One of those institutions born to facilitate tyranny, its existence was measured by the term of the depression of the subject. To enter into detail here concerning it, would be foreign to our task. To pass it without mention, would be to ignore one of the chief obstacles to independent individual utterance during the Tudor and early Stuart periods.

**Trial by Jury.**<sup>1</sup>—The origin of this venerable and invaluable principle of our Constitution is wrapped in uncertainty. During the early portion of the fifteenth century, about the year 1408, it appears to have assumed its present form. This, therefore, is a convenient place for our notice of it. Two theories alone are now accepted as probable:—First, that the system existed in Normandy, and was introduced here as one of the results of the Conquest—‘a view entertained by Reeves, Serjeant Stephen, and apparently by Sir Francis Palgrave at the time he wrote his *“Rise and Progress of the English Commonwealth,”* though in his more recent *“History of Normandy and England”* he seems to have changed his judgment.’<sup>2</sup> The second, that trial by jury was of Anglo-Norman origin, and that its birth may be dated at 1176—*i.e.*, during the reign of Henry II. The student of English history will not fail to remember that, while the Saxon was famous for his *trial by ordeal*, the *trial by battle* was the great judiciary feature of the Norman suit. There was also a third mode by which the truth of facts in dispute was supposed to be ascertainable—*viz.*, by *compurgation*, or

<sup>1</sup> As to the myth of its being ascribable to Alfred the Great, see Creasy, p. 214.

<sup>2</sup> Creasy, p. 217.

the oath of the twelve men summoned from the immediate neighbourhood. The following are the scanty data upon which our judgment must be based:—In 1176,<sup>1</sup> sworn recognitors were substituted for *trial by battle* in disputes concerning land; in 1215, the Fourth Lateran Council prohibited the continuance of *trial by ordeal*; the provisions of Magna Charta, sec. 39<sup>2</sup>; in 1349, witnesses were added to the jury, to afford them the benefit of their knowledge; in or about 1408, witnesses were distinct from the jury, and it was declared that questions of *law* are for the determination of the judge, questions of *fact*<sup>3</sup> for that of the jury—*ad quæstionem facti non respondent iudices, ad quæstionem juris non respondent juratores*.

**Checks upon the Crown in 1485.**—Our notice of the fifteenth century may be appropriately concluded with the following extract from Hallam:—"The essential checks upon the royal authority were five in number:—1. The king could levy no sort of *new tax* upon his people, except by the grant of his Parliament, consisting as well of bishops and mitred abbots or lords spiritual, and of hereditary peers or temporal lords, who sat and voted promiscuously in the same chamber, as of representatives from the freeholders of each county, and from the burgesses of many towns and less considerable places, forming the Lower or Commons' House. 2. The previous assent and authority of the

<sup>1</sup> The 6th and 9th Articles of the Constitutions of Clarendon (see p. 107), which appear to be overlooked in this discussion, raise a strong presumption that the system of trial by jury is of older date than 1176.

<sup>2</sup> See p. 116.

<sup>3</sup> The Marquis Beccaria says,—'I deem that the best judicial system which associates with the principal judges assessors, not selected, but chosen by lot; for in such matters ignorance, which judges by sense, is safer than science, which judges by opinion.' ("Dei Delitti e delle Pene," § 7.)

same assembly were necessary for every *new law*, whether of a general or temporary nature. 3. No man could be committed to *prison* but by a legal warrant specifying his offence; and by an usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. 4. The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a *jury of twelve men*, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. 5. The officers and servants of the Crown, violating the personal liberty or other rights of the subject, might be sued in an action for damages, to be assessed by a jury, and, in some cases, were liable to criminal process; nor could they plead any covenant or command in their justification, not even the direct order of the king.<sup>1</sup>

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SIXTEENTH CENTURY—1500 to 1599.

*Henry VII.*, 1485 to 1509.

*Henry VIII.*, 1509 to 1547.

*Edward VI.*, 1547 to 1553.

*Mary*, 1553 to 1558.

*Elizabeth*, 1558 to 1603.

THE 16th century, or, speaking more exactly, the Tudor period (1485—1603), is perhaps the most singular portion of British history. To the constitutional historian it is almost a blank. His hitherto steadily

<sup>1</sup> Hallam's Constitutional History, vol. i. p. 2.

progressive course is suddenly checked. The proofs of regal violence on the one hand, of popular lethargy on the other, satisfy him that some mighty change has been wrought. In his search for the cause, he observes that the ancient and powerful colleague of the Commons in this struggle against the Crown—the *Nobles*—has been destroyed, or crippled. No fewer than eighty princes of the blood are said to have perished during the wars of the Roses. The subtle policy of Henry VII., and the resolute ferocity of Henry VIII., threatened their remaining vitality.

The sole existing power capable of coping with the Crown—the Church—was laid prostrate by Henry VIII., who little dreamed, when he discarded and broke the heart of Wolsey in 1530—when he prohibited appeals to the Pope in 1533—when he declared himself supreme Head of the Church in 1534—when he suppressed the lesser monasteries in 1536, and the larger monasteries in 1538 and 1539,—that he was, step by step, placing regal tyranny beyond the range of possibility. It is true that the immediate result was the free sway of his sovereign will; that unchallenged he set at defiance alike the bonds of matrimony and humanity; that he could find a Parliament ready, in 1539, to declare that the King's proclamation should have the force of law; and, in 1541, to empower him to dispose of the Crown by his will. But it soon proved equally true that neither Kings nor Parliaments, neither fire nor sword, could induce men once taught to question authority in matters of religious belief, ever to re-surrender that right. While the ministers of the Reformation preached a new faith, while Henry was dismantling the bulwarks of the old, the people presumed to think for

themselves. Edward VI. supported Protestantism, his sister Mary restored the Papacy, Elizabeth Protestantism. But the Acts of Uniformity and Supremacy in 1559, and the establishment of the High Commission Court,<sup>1</sup> in the same year, proved but partial and temporary measures. The Puritans, the Brownists or Independents, the Quakers, and other sects, followed one another in rapid succession. Every attempt, legislative or otherwise, to suppress them having failed, the *Toleration Act* was finally passed at the latter end of the next century, viz. in 1689.

I assume it to be a fact fully warranted by universal history, that in this a nation is like an individual—its attention is centered in the thing of interest of the moment. To this phenomenon may be ascribed a large measure of Tudor arrogance. Had it not been for this, it is extremely questionable whether the shock sustained by the nobles would have sufficed to loosen all restraint upon the Throne. The student overlooks important facts who fails to notice the effect that must have been produced by the recent discovery of America, and the mighty impulse given to commerce as its result ;

<sup>1</sup> 'The Court of High Commission was finally established in 1583. Several commissions had already sat in Elizabeth's reign, for purposes similar to that for which it was permanently founded. The tribunal consisted of forty-four commissioners, twelve of whom were prelates ; and three, of whom one must be a bishop, formed a quorum. It took cognizance of all matters relative to religion, such as absence from church, heretical opinions, seditious books, slanders, and immorality ; and its proceedings, like those of the Star-chamber, were conducted contrary to the mode of the ordinary courts—indeed, it adopted the un-English practice of requiring suspected persons to answer on oath any questions that might be put to them. These "interrogatories" were so comprehensive as to embrace the whole scope of clerical uniformity, yet so precise and minute as to leave no room for evasion.' The court had power to excommunicate, fine, and imprison.—Curtis, p. 248.

by the rapid spread of learning among the middle classes attributable to printing ; by the fact that attendance in Parliament, so far from being regarded, as formerly, a burden to be escaped where possible, was now esteemed an honour courted by the rich ; not unfrequently gratified at large cost, and no small sacrifice of principle. If we admit the theory of absorbed or divided attention, and observe the dates of the discovery of America, the introduction of printing and religious agitation, we possess, independently of the condition of the nobles, sufficient data for the opportunity afforded the Crown to attempt the re-assertion of its ancient supremacy. And by assuming a House of Commons largely intent upon personal gratification, we have a complete explanation of an otherwise inexplicable retrogression, and are in possession of a key to the reaction which commenced during the reign of Elizabeth and culminated under the Stuarts, sweeping in its unbridled course not merely Kings from the Throne but Royalty from the land.

The discovery of America, the invention of printing, the overthrow of the papacy, having become things of the past, and their consequences the habit of the present, men again began to turn their attention to politics, and looked with concern upon the neglected vessel of the Constitution. No monarch better fitted to occupy a throne under such circumstances could have been found than the illustrious Elizabeth, no worse than her immediate successors James and Charles I.

The remaining facts of this century that require to be mentioned appear to be these:—In 1549, the Clergy were permitted to marry. In 1558, Calais, our last possession in France, was captured from the English by the

Duke of Guise. In 1563, the basis of the present Poor Law system was laid. In 1574, Villenage was abolished in Elizabeth's manors. In 1597, Monopolies were petitioned against, and shortly after abolished.

During the 45 years of Elizabeth's reign there were only 13 Parliaments. She rejected 48 Bills which had passed both Houses; she created 82 rotten boroughs.

#### SEVENTEENTH CENTURY—1600 to 1699.

*Elizabeth*, 1558 to 1603.

*James I.*, 1603 to 1625.

*Charles I.*, 1625 to 1649.

*The Commonwealth*, 1649 to 1660.

*Charles II.*, 1660 to 1685.

*James II.*, 1685 to 1689.

*William III. and Mary*, 1689 to 1694.

*William III. alone*, 1694 to 1702.

OF James I. Carte says, 'by the time he reached London (from Scotland) the admiration of the intelligent world was turned into contempt.' Scarcely was he seated upon his new throne, before he twice came into collision with Parliament.<sup>1</sup> Each case resulted in a pitiable demonstration of the absurdity of his pet theory, '*the right divine of the Stuart kings.*'

**The Rights of the House of Commons in the matter of Contested Elections.**—'In the proclamation for calling together his first Parliament, the King, after dilating, as was his favourite practice, on a series of rather commonplace truths in very good language, charges all persons interested in the choice of knights

<sup>1</sup> Partly on account of the unhealthiness of the season in London, an entire year was suffered to elapse before James summoned his first Parliament.

for the shire to select them out of the principal knights or gentlemen within the county; and for the burgesses, that choice be made of men of sufficiency and discretion, without desire to please parents and friends, that often speak for their children or kindred; avoiding persons noted in religion for their superstitious blindness one way, or for their turbulent humour otherways. We do command, he says, that no bankrupts or outlaws be chosen, but men of known good behaviour and sufficient livelihood. The sheriffs are charged not to direct a writ to any ancient town, being so ruined that there are not residents sufficient to make such choice, and of whom such lawful election may be made. All returns are to be filed in Chancery; and if any be found contrary to this proclamation, the same are to be rejected as unlawful and insufficient, and the place to be fined for making it; and any one elected contrary to the purport, effect, and true meaning of this proclamation is to be fined and imprisoned.'

'Such an assumption of control over parliamentary elections was a glaring infringement of those privileges which the House of Commons had been steadily and successfully asserting in the late reign. An opportunity very soon occurred of contesting this important point. At the election of the county of Buckingham, Sir Francis Goodwin had been chosen in preference to Sir John Fortescue, a Privy Councillor, and the writ returned into Chancery. Goodwin had some years before been outlawed. The return was sent back to the sheriff, as contrary to the late proclamation; and, on a second election, Sir John Fortescue was chosen. This matter being brought under the consideration of the House of Commons a few days after the opening of

the session, gave rise to their first struggle with the new King. It was resolved, after hearing the whole case, and arguments by members on both sides, that Goodwin was lawfully elected and returned, and ought to be received. The first notice taken of this was by the Lords, who requested that this might be discussed in a conference between the two Houses before any other matter should be proceeded with. The Commons returned for answer that they conceived it not according to the honour of the House to give account of any of their proceedings. The Lords replied, that having acquainted his Majesty with the matter, he desired there might be a conference thereon between the two Houses. Upon this message the Commons came to a resolution that the Speaker, with a numerous deputation of members, should attend his Majesty, and report the reasons of their proceedings in Goodwin's case. In this conference with the King, as related by the Speaker, it appears that he had shown some degree of chagrin, and insisted that the House ought not to meddle with returns, which could only be corrected by the Court of Chancery; and that, since they derived all matters of privilege from him and his grant, he expected that they should not be turned against him. He ended by directing the House to confer with the Judges. After a debate, which seems, from the minutes in the Journals, to have been rather warm, it was unanimously agreed not to have a conference with the Judges; but the reasons of the House's proceeding were laid before the King, in a written statement or memorial, answering the several objections that his Majesty had alleged. This they sent to the Lords, requesting them to deliver it to the King, and to be mediators on behalf of the

House for his Majesty's satisfaction,—a message in rather a lower tone than they had previously taken. The King, sending for the Speaker, privately told him that he was now distracted in judgment as to the merits of the case ; and, for his further satisfaction, desired and commanded, as an absolute King, that there should be a conference between the House and the Judges. Upon this unexpected message, says the Journal, there grew some amazement and silence. But at last one stood up and said,—“The Prince's command is like a thunderbolt ; his command upon our allegiance like the roaring of a lion. To his command there is no contradiction ; but how or in what manner we should now proceed to perform obedience, that will be the question.” It was resolved to confer with the Judges in presence of the King and Council. In this second conference, the King, after some favourable expressions towards the House, and conceding that it was a Court of Record and Judge of Returns, though not exclusively of the Chancery, suggested that both Goodwin and Fortescue should be set aside, by issuing a new writ. This compromise was joyfully accepted by the greater part of the Commons, after the dispute had lasted nearly three weeks. They have been considered as upon the whole victorious in this contest, though they apparently fell short in the result of what they had obtained some years before. No attempt was ever afterwards made to dispute their exclusive jurisdiction in this respect.<sup>1</sup>

**Privilege of Parliament.**—‘Sir Thomas Shirley, a Member of the House of Commons, having been taken in execution on a private debt before the meeting of

<sup>1</sup> Hallam, “Constitutional History,” vol. i. p. 299, *et seq.*

the House, and the Warden of the Fleet prison refusing to deliver him up, the House was at a loss to know how to obtain his release. Several methods were projected; among which, that of sending a party of Members with the Sergeant and his mace to force open the prison, was carried on a division; but the Speaker hinting that such a vigorous measure would expose them individually to prosecution as trespassers, it was prudently abandoned. The Warden, though committed by the House to a dungeon in the Tower, continued obstinate, conceiving that, by releasing his prisoner, he should become answerable for the debt. They were evidently reluctant to solicit the King's interference; but aware at length that their own authority was insufficient, 'The Vice-Chamberlain,' according to a memorandum in the Journals, 'was privately instructed to go to the King, and humbly desire that he would be pleased to command the Warden, on his allegiance, to deliver up Sir Thomas; not as petitioned for by the House, but as if himself thought it fit, out of his own gracious judgment.' By this stratagem, if we may so term it, they saved the point of honour, and recovered their member. The Warden's apprehensions, however, of exposing himself to an action for the escape, gave rise to a statute, which empowers the creditor to sue out a new execution against anyone who shall be delivered from custody by virtue of his privilege of Parliament, after that shall have expired, and discharges from liability those out of whose custody such persons shall be delivered. This is the first legislative recognition of privilege. The most important part of the whole is a proviso subjoined to the Act, 'That nothing therein contained shall extend to the diminishing of any

punishment to be hereafter, by censure in Parliament, inflicted upon any person, who hereafter shall make, or procure to be made, any such arrest as is aforesaid.' The right of commitment, in such cases at least, by a vote of the House of Commons, is here unequivocally maintained.<sup>1</sup>

During the early part of his reign, James, in addition to his legitimate sources of revenue, obtained money by Star-Chamber fines, Dutch exports of gold coin, benevolences, and the sale of titles (the title of baronet was created in 1611, its price was £1095), and the imposition of duties without the sanction of Parliament.

**Bates' Case.**—In 1608, the King imposed a duty of 5s. per cwt. on currants, in addition to the 2s. 6d. allowed by the tonnage and poundage granted by Parliament. Bates, a Turkey merchant, refused to pay it. An information was exhibited against him in the Exchequer. Judgment was given for the Crown, Chief Baron Fleming and Baron Clark ruling that 'the King's power is double, ordinary and absolute, these have several laws and ends,—that 'the seaports are the King's gates, which he may open and shut to whom he pleases,'—that 'the 43rd Edward III., c. 4—which enacts that no imposition shall be laid on wool or leather—did not bind that King's successors.'<sup>2</sup>

With hirelings like these on the Bench, it is not surprising that James was emboldened to go a little further. In July, 1608, under the authority of the Great Seal, was published his '*Book of Rates*,' by which heavy duties were imposed upon almost every kind of merchandise.

It is hard to say which exhibited themselves as

<sup>1</sup> Hallam, Const. Hist., vol. i. p. 302.

<sup>2</sup> See Lane's Reports.

the more contemptible specimens of humanity, the more abject sycophants—the Bench or the Church. At the Hampton Court Conference, in 1604, Bancroft, Bishop of London, falling on his knees, exclaimed, ‘I protest my heart melteth for joy that Almighty God, of his singular mercy, has given us such a King as since Christ’s time hath not been.’

The year 1621 is memorable for the revival of impeachments; for the scandalous treatment of Floyd<sup>1</sup>; and for the reunion of both Houses in opposition to the Crown.

**Impeachments Revived.**—The first instance of impeachment, it will be remembered, was that of Lord Latimer, in 1376. From that period till the impeachment of the Duke of Suffolk, in 1449, the practice was resorted to as occasion suggested. From 1449,<sup>2</sup> however, it had fallen into disuse, partly from the condition of Parliament, and partly from the preference the Tudor Princes had given to *Bills of Attainder*, or of *Pains and Penalties*, when they wished to turn the arm of their servile Parliaments against an obnoxious subject. In 1621, Sir Giles Mompesson was impeached for the abuse of his monopolies for gold and silver thread, and the licensing of inns and alehouses; Michell, a Justice of the Peace, for being the accomplice and instrument of Mompesson; Sir John Burnet, Judge of the Prerogative Court, for corruption in his office; Field,

<sup>1</sup> Floyd, a Roman Catholic gentleman, appears to have used some slighting words about the Elector Palatine and his wife, who were Protestants, for which he was sentenced to degradation, to the pillory, to be branded in the forehead, to be whipped at the cart’s tail, to pay a fine of £5000, and to be imprisoned in Newgate during his life.

<sup>2</sup> Whether the proceedings against the Bishop of London, in 1534, can be regarded as an impeachment, is in dispute. (See Hallam, vol. i. p. 357, and note.)

Bishop of Llandaff, for a matter of bribery ; and Lord Chancellor Bacon, for receiving bribes from suitors in his court. In 1624, the Earl of Middlesex, Lord Treasurer of England, for bribery and other misdemeanours.

**Declaration of the Commons as to their Rights.—**

In 1621, dissatisfied with the state of affairs on the Continent, 'the Commons drew up a petition and remonstrance against the growth of Popery ; suggesting among other remedies for this grievance, that Prince Charles should marry one of our own religion, and that the King would direct his efforts against that power (meaning Spain) which first maintained the war in the Palatinate.'<sup>1</sup> The King having obtained a copy of the petition before it was presented, sent a peremptory letter to the Speaker, directing him to acquaint the House with his pleasure that none therein should presume to meddle with anything concerning his Government or *mysteries* of State ; namely, not to speak of his son's match with the Princess of Spain, nor to touch the honour of that King, or any other of his friends or confederates. Correspondence ensued, the Commons laid stress upon that part of the King's message which threatened them for liberty of speech. James in reply said, that 'although he could not allow of the style calling their privileges an undoubted right and inheritance, but could rather have wished that they had said that their privileges were derived from the grace and permission of his ancestors and himself—for most of them had grown from precedent, which rather shows a toleration than inheritance ; yet he gave them his royal assurance, that so long as they contained themselves within the limits of their duty, he would be as careful to maintain

<sup>1</sup> Hallam, vol. i. p. 364.

their lawful liberties and privileges as he would his own prerogative; so that their House did not touch on that prerogative which would enforce him or any just King to retrench their privileges.' After a lengthened and warm debate, the Commons, on the 18th of December, 1621, recorded in their Journal the following unequivocal protestation:—

'The Commons now assembled in Parliament, being justly occasioned thereunto, concerning sundry liberties, franchises, privileges, and jurisdictions of Parliament, amongst others not herein mentioned, do make this protestation following:—That the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, the State, and the defence of the realm and of the Church of England, and the making and maintenance of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament; and that in the handling and proceeding of those businesses, every Member of the House hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion, the same; that the Commons in Parliament have like liberty and freedom to treat of those matters in such order as in their judgments shall seem fittest; and that every such Member of the said House hath like freedom from all impeachment, imprisonment, and molestation—other than by the censure of the House itself—for or concerning any Bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament business; and that if any of

the said Members be complained of and questioned for anything said or done in Parliament, the same is to be showed to the King by the advice and assent of all the Commons assembled in Parliament, before the King give credence to any private information.'<sup>1</sup>

James at once adjourned, and in about a fortnight dissolved Parliament. Sir Edward Coke, Sir Robert Philips, Mr. Pym, and one or two other conspicuous leaders, were imprisoned, and others variously disposed of. *'It is worthy of observation that, in this Session, a portion of the Upper House had united in opposing the Court. Nothing of this kind is noticed in former Parliaments, except perhaps a little on the establishment of the Reformation.'*<sup>2</sup> In this minority were Oxford, Southampton, Essex, Warwick, Say, and Spencer. Oxford and Southampton were examined before the Council, and the former, on pretence of having spoken words against the King, was committed to the Tower.

'The Commons had now (1625) been engaged, for more than twenty years, in a struggle to restore and to fortify their own and their fellow subjects' liberties. They had obtained in this period but one legislative measure of importance, the late declaratory Act against Monopolies. But they had rescued from disuse their ancient right of impeachment. They had placed on record a protestation of their claim to debate all matters of public concern. They had remonstrated against the usurped prerogatives of binding the subject by proclamation, and of levying customs at the out-ports. They had secured, beyond controversy, their exclusive privilege of determining contested elections of their

<sup>1</sup> Debates of 1621, p. 359; Hallam, vol. i. p. 367.

<sup>2</sup> Hallam, vol. i. p. 368.

members. Of these advantages, some were evidently incomplete; and it would require the most vigorous exertions of future Parliaments to realize them.<sup>1</sup>

Charles I. summoned five Parliaments.

**The First** met on the 18th of June, and was dissolved 12th August, 1625. It voted £140,000 and tonnage and poundage, but for one year only, instead of for the King's life, the practice for the previous two and a half centuries. This Parliament was dissolved to avoid an attack upon Buckingham.

**The Second** Parliament met on the 6th of February, 1626, and was dissolved on the 15th of June of the same year. The Commons, during this session, impeached Buckingham at the bar of the House of Lords on eight articles. Sir John Eliot and Sir Dudley Digges, conspicuous commoners, were sent by the King to the Tower, charged with speaking in derogation of his Majesty's honour. The Commons, and thirty-six of the Peers, denied that he had so spoken. The King admitted he was mistaken. The two were released.

For a private matter, the marriage of his son with a lady of royal blood, the Earl of Arundel was thrown into the Tower. The Lords resented this violation of their privilege, and resolved 'that no Lord of Parliament, the Parliament sitting, or within the usual times of privilege of Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety for the peace.'<sup>2</sup> Messages passed between the King and the Lords. Arundel was liberated.

For reasons personal to the King, he refused a writ

<sup>1</sup> Hallam, *Constitutional History*, vol. i. p. 373.

<sup>2</sup> *Parl. Hist.*, p. 125; *Hatsell*, p. 141; *Hallam*, vol. i. p. 379.

of summons to the Earl of Bristol. The Peers insisted upon his writ being sent; the King complied, and it was sent, but accompanied with the secretary's letter, containing an injunction not to comply with it by taking his place. The Earl, however, took his place, and laid the letter before the House of Lords. Articles were then preferred against him by the Attorney General, and he was committed to the Tower. Parliament was dissolved. Loans were demanded, refusers were imprisoned by the *special command of his Majesty*, the right was tried by Habeas Corpus, the judges decided in favour of the Crown. 'No year within the memory of any one living, had witnessed such violations of public liberty as 1627.'<sup>1</sup> The King's necessities compelled him to call another Parliament.

**The Third** Parliament met on the 17th of March, 1628, and was dissolved on the 10th of March, 1629.

A detailed account of the proceedings of this most interesting Parliament will be found in the second volume of the Parliamentary History. Among the characteristic men of the Commons were Wentworth, who afterwards went over to the Court, Selden, Pym, Holles, Coke, Eliot, Hampden, Noye, and Glanville. The two Houses discussed the King's powers and the subjects' rights. Charles endeavoured to soothe the Commons, then more warm upon the subject than the Lords, with general promises. Referring to this, Sir Edward Coke said, 'Did ever Parliament rely on messages? The King must speak by a record, and in particulars, and not in generals. Let us put up a Petition of Right; not that I distrust the King, but that we cannot take his trust save in a parliamentary way.'

<sup>1</sup> Hallam, Constitutional History, vol. i. p. 387.

This suggestion was acted upon, and the Petition of Right was drawn up. The Lords suggested an amendment which would have greatly impaired it.<sup>1</sup> The two Houses argued the matter most temperately. The Peers at length gave way. The petition was presented, and ultimately, June 7, 1628, it received the royal assent in the usual form. Under what circumstances, and with what mental reservation, the student may learn by reference to Hallam, Constitutional History, vol. i. p. 389 *et seq.*

**Petition of Right.**—3 CAR. I. c. 1. June 7, 1628.—The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subject, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty.

Humbly shew unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons, in Parliament assembled, that whereas it is declared and enacted by a Statute made in the time of the reign of King Edward I., commonly called *Statutum de tallagio non concedendo*, that no tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm; and by authority of Parliament holden in the five-and-twentieth year of the reign of King Edward III., it is declared and enacted, that from thenceforth no person should be compelled to make any loans to the King against his will, because such loans were against reason and the

<sup>1</sup> See Creasy, p. 286.

franchise of the land ; and by other laws of this realm it is provided that none should be charged by any charge or imposition called a benevolence, nor by such like charge ; by which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge, not set by common consent, in Parliament.

II. Yet, nevertheless, of late divers commissions directed to sundry commissioners in several counties, with instructions, have issued ; by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance and give utterance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted ; and divers other charges have been laid and levied upon your people in several counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by command or direction from your Majesty, or your Privy Council, against the laws and free customs of the realm.

III. And whereas also, by the statute called "The Great Charter of the liberties of England," it is declared and enacted, that no freeman may be taken or imprisoned, or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight-and-twentieth year of the reign of King Edward III., it was declared and enacted by authority of Parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to their several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. And whereas also by authority of Parliament, in the five-and-twentieth year of the reign of King Edward III., it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the

said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by Acts of Parliament : and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm : nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the martial law.

VIII. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought to have been judged and executed.

IX. And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishment due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws

and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all others of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; and that none be called to make answer, or to take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; and that the aforesaid commissions for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the

further comfort and safety of your people, to declare your royal will and pleasure, that in the things afore-said all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

*Quâ quidem petitione lectâ et plenius intellectâ per dictum dominum regem taliter est responsum in pleno parlamento, viz. Soit droit fait comme est désiré.*

For the moment satisfied, the Commons voted the King the unusually large sum of £350,000. Parliament was shortly afterwards dissolved. On August 23rd, the Duke of Buckingham, while preparing an expedition to aid the Huguenots, beleaguered in Rochelle by Cardinal Richelieu, was assassinated at Portsmouth, by Felton, a lieutenant in the army.

**The Three Resolutions.**—On the 20th January, 1629, Parliament reassembled. In the mean time, Rochelle had fallen. Its fall was imputed to the neglect of the Government. Tonnage and poundage had been illegally imposed. The Arminian clergy, the advocates of the doctrine of the divine right of the King, had received marks of the royal favour. The Commons were incensed, and, notwithstanding the protest of the Speaker, they passed three resolutions declaring—1, that the introducers of Popery, or Arminianism, or other innovations in religion; 2, that those who should counsel and advise the taking and levying of tonnage and poundage without Parliamentary vote; and 3, that those who should voluntarily pay the same, were capital enemies to the kingdom and commonwealth. This was on the 2nd of March, 1629. The King immediately adjourned the House till the 10th,

and on that day he dissolved Parliament with the threat that the '*vipers should meet with their reward.*'

Eliot, Hollis, Selden, Strode, Valentine, and others, were fined and imprisoned. Sir Dudley Digges, Wentworth, afterwards created Earl of Strafford, Noy, Littleton, and others, had by this time joined the King, who now resolved to govern without a Parliament. This attempt lasted from the 10th of March, 1629, till the 11th of April, 1640, during which, abetted conspicuously by Strafford and Laud Archbishop of Canterbury, Charles extorted money from his English subjects by illegal taxation and the disgraceful instrumentality of the Star Chamber and the High Commission Court.

By his absurd attempt to force the Liturgy upon the Scots, Charles drove them to armed resistance in defence of their religious freedom, when, finding himself unequal to the contest, he suggested an accommodation, and agreed to the *Pacification of Berwick*, whereby he bound himself to summon an Assembly and Parliament to adjust existing differences.

**Hampden's Case.**—It was during this period that John Hampden, a gentleman of good estate in Buckinghamshire, refused upon principle to pay the sum of 20*s.*, the amount at which he was assessed as *ship-money*. I give the valuable account of the proceedings taken against him in the words of Hallam.<sup>1</sup> 'The cause, though properly belonging to the Court of Exchequer, was heard, on account of its magnitude, before all the Judges in the Exchequer Chamber. The precise question, so far as related to Mr. Hampden, was, whether the King had a right, on his own allegation of

<sup>1</sup> Constitutional History, vol. 2, p. 17 *et seq.*

public danger, to require an inland county to furnish ships, or a prescribed sum of money by way of commutation, for the defence of the kingdom? It was argued by St. John and Holborne on behalf of Hampden; by the Solicitor-General Littleton, and the Attorney-General Banks, for the Crown.

‘The law and constitution of England, the former maintained, provided in various ways for the public safety and protection against enemies. First, there were the *military tenures*, which bound great part of the kingdom to a stipulated service at the charge of the possessors. The *Cinque Ports* also, and several other towns, some of them not maritime, held by a tenure analogous to this; were bound to furnish a quota of ships or men, as the condition of their possessions and privileges. These, for the most part, are recorded in Domesday-book, though now in general grown obsolete. Next to this specific service, our constitution had bestowed on the Sovereign his certain revenues, the fruits of tenure, the profits of his various minor prerogatives; whatever, in short, he held in right of his Crown, was applicable, so far as it could be extended, to the public use. It bestowed on him, moreover, and perhaps with more special application to maritime purposes, the customs on importation of merchandise. These, indeed, had been recently augmented far beyond ancient usage. “For these modern impositions,” says St. John, “of the legality thereof I intend not to speak; for in case his Majesty may impose upon merchandise what himself pleaseth, there will be less cause to tax the inland counties; and in case he cannot do it, it will be strongly presumed that he can much less tax them.”

‘ But as the ordinary revenues might prove unequal to great exigencies, the Constitution has provided another means, as ample and sufficient as it is lawful and regular, Parliamentary supply. To this the Kings of England have at all times had recourse ; yet Princes are not apt to ask as a concession what they might demand of right. The frequent loans and benevolences which they have required, though not always defensible by law, are additional proofs that they possessed no general right of taxation. To borrow on promise of repayment, to solicit, as it were, alms from their subjects, is not the practice of sovereigns whose prerogatives entitle them to exact money. Those loans had sometimes been repaid, expressly to discharge the King’s conscience. And a very arbitrary prince, Henry VIII., had obtained Acts of Parliament to release him from the obligation of repayment.

‘ These merely probable reasonings prepare the way for that conclusive and irresistible argument that was founded on Statute Law. Passing slightly over the Charter of the Conqueror, that his subjects shall hold their lands free from all unjust tallage, and the clause in John’s Magna Charta, that no aid or scutage should be assessed but by consent of the Great Council (a provision not repeated in that of Henry III.), the advocates of Hampden relied on the 25 Ed. I., commonly called the *Confirmatio Chartarum*, which for ever abrogated all taxation without consent of Parliament ; and this statute itself, they endeavoured to prove, was grounded on requisitions very like the present for the custody of the sea, which Edward had issued the year before. Hence it was evident that the saving contained in that Act for the accustomed aids and prizes could

not possibly be intended, as the opposite counsel would suggest, to preserve such exactions as ship-money, but related to the established feudal aids, and to the ancient customs on merchandize. They dwelt less, however, (probably through fear of having this exception turned against them,) on this important statute than on one of more celebrity, but of very equivocal genuineness, denominated *De Tallagio non concedendo*, which is nearly in the same words as the *Confirmatio Chartarum*, with the omission of the above-mentioned saving. More than one law, enacted under Edward III., reasserts the necessity of parliamentary consent to taxation. It was, indeed, the subject of frequent remonstrance in that reign, and the King often infringed this right. But the perseverance of the Commons was successful, and ultimately rendered the practice conformable to the law. In the second year of Richard II., the realm being in imminent danger of invasion, the Privy Council convoked an assembly of Peers and other great men, probably with a view to avoid the summoning of a Parliament. This assembly lent their own money, but declared that they could not provide a remedy without charging the Commons, which could not be done out of Parliament, advising that one should be speedily summoned. This precedent was the more important, as it tended to obviate that argument from peril and necessity, on which the defenders of ship-money were wont to rely. But they met that specious plea more directly. They admitted that a paramount overruling necessity silences the voice of law; that in actual invasion, or its immediate prospect, the rights of private men must yield to the safety of the whole; that not only the sovereign, but each man, in respect of his neighbour,

might do many things absolutely illegal at other seasons; and this served to distinguish the present case from strong acts of the prerogative exerted by Elizabeth in 1588, when the liberties and religion of the people were in the most apparent jeopardy. But here there was no overwhelming danger; the nation was at peace with all the world: could the piracies of Turkish corsairs, or even the insolence of rival neighbours, be reckoned among those instant perils for which a Parliament would provide too late?

‘To the precedents alleged on the other side it was replied, that no one of them met the case of an inland county; that such as were before the 25 Ed. I. were sufficiently repealed by that statute; such as occurred under Edward III., by the later statutes and by the remonstrances of Parliament during his reign; and there were but very few afterwards. But that, in a matter of statute law, they ought not to be governed by precedents, even if such could be adduced. Before the latter end of Edward I.’s reign, St. John observes, “all things concerning the King’s prerogative and the subjects’ liberties were upon uncertainties.” “The government,” says Holborne truly, “was more of force than law.” And this is unquestionably applicable, in a less degree, to many later ages.

‘Lastly, the Petition of Right, that noble legacy of a slandered Parliament, reciting and confirming the ancient statutes, had established that no man thereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament. This latest and most complete recognition must sweep away all contrary precedent, and could not, without a glaring violation of

its obvious meaning, be stretched into an admission of ship-money.

‘The King’s counsel, in answer to these arguments, appealed to that series of records which the diligence of Noy had collected. By far the greater part of these were commissions of array. But several even of those addressed to inland towns (and if there were no service by tenure in the case, it does not seem easy to distinguish these in principle from counties) bore a very strong analogy to the present. They were, however, in early times. No sufficient answer could be offered to the statutes that had prohibited unparliamentary taxation. The attempts made to elude their force were utterly ineffectual, as those who are acquainted with their emphatic language may well conceive. But the Council of Charles the First, and the hirelings who ate their bread, disdained to rest their claim of ship-money (big as it was with other and still more novel schemes) on obscure records, or on cavils about the meaning of statutes. They resorted rather to the favourite topic of the times,—the intrinsic, absolute authority of the King. This the Attorney-General, Banks, placed in the very front of his argument. “This power,” says he, “is innate in the person of an absolute King, and in the persons of the Kings of England. All magistracy, it is of nature; and obedience and subjection, it is of nature. This power is not in any way derived from the people, but reserved unto the King when positive laws first began. For the King of England he is an absolute monarch; nothing can be given to an absolute prince but what is inherent in his person. He can do no wrong. He is the sole judge, and we ought not to question him. Where the law trusts, we ought not to

distrust. The Acts of Parliament," he observed, "contained no express words to take away so high a prerogative; and the King's prerogative, even in lesser matters, is always saved, wherever express words do not restrain it." But this last argument appearing too modest for some of the Judges who pronounced sentence in this cause, they denied the power of Parliament to limit the high prerogatives of the Crown. "This imposition without Parliament," says Justice Crawley, "appertains to the King originally, and to his successor *ipso facto*, if he be a sovereign in right of his sovereignty from the Crown. You cannot have a King without these royal rights; no, not by Act of Parliament." "Where Mr. Holborne," says Justice Berkley, "supposed a fundamental policy in the creation of the frame of this kingdom, that in case the monarch of England should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them, but upon a common consent in Parliament, he is utterly mistaken herein. The law knows no such king-yoking policy. The law is itself an old and trusty servant of the King's; it is his instrument or means which he useth to govern his people by. I never read nor heard that *lex* was *rex*; but it is common and most true, that *rex* is *lex*." Vernon, another Judge, gave his opinion in a few words: "That the King, *pro bono publico*, may charge his subjects for the safety and defence of the kingdom, notwithstanding any Act of Parliament, and that a statute derogating from the prerogative doth not bind the King; and the King may dispense with any law in cases of necessity." Finch, the adviser of the ship-money, was not backward to employ the same argument in its behalf. "No Act

of Parliament," he told them, "could bar a King of his regality, as that no land should hold of him, or bar him of the allegiance of his subjects, or the relative on his part, as trust and power to defend his people; therefore Acts of Parliament to take away his royal power in the defence of his kingdom are void; they are void Acts of Parliament to bind the King not to command the subjects, their persons and goods, and I say their money too; for no Acts of Parliament make any difference." Seven of the twelve Judges, namely, Finch, Chief Justice of the Common Pleas, Jones, Berkley, Vernon, Crawley, Trevor, and Weston, gave judgment for the Crown. Brampton, Chief Justice of the King's Bench, and Davenport, Chief Baron of the Exchequer, pronounced for Hampden, but on technical reasons, and adhering to the majority on the principal question. Denham, another Judge of the same Court, being extremely ill, gave a short written judgment in favour of Hampden. But Justices Croke and Hutton, men of considerable reputation and experience, displayed a most praiseworthy intrepidity in denying, without the smallest qualification, the alleged prerogative of the Crown, and the lawfulness of the writ for ship-money. They had unfortunately signed, along with the other Judges, the above-mentioned opinion in favour of the right. For this they made the best apology they could, that their voice was concluded by the majority. But, in truth, it was the ultimate success that sometimes attends a struggle between conscience and self-interest or timidity.'

**The Fourth Parliament.**—The promised Parliament met on the 13th of April, 1640. The King demanded £840,000. The Commons thought it expedient to pre-

face their grant with a redress of grievances. Charles dissolved the Parliament on the 5th of May. This step satisfied the Scots that their only safety was in battle. They crossed the Tweed on the 20th of August, defeated Lord Conway at Newburn on the 28th, and speedily made themselves masters of the two northern counties. Charles, in his extremity, summoned a great Council of Peers at York; it met on the 24th of September, and was unanimous in its advice to the King. Upon this advice he reluctantly acted, and called his fifth and last Parliament.

**The Fifth Parliament.**—This Parliament, commonly called the Long Parliament, met on the 3rd of October, 1640; it was dissolved by Cromwell on the 20th of April, 1653.

Strafford and Laud were impeached: the former was executed on the 12th of May, 1641; the latter on the 10th of January, 1645.

**The Triennial Bill.**—By the Triennial Bill of the 16th of February, 1641, 16 Charles I. c. 1, every Parliament was to be *ipso facto* dissolved at the expiration of three years from the first day of its Session, unless actually sitting at the time, and, in that case, at its first adjournment or prorogation. The Chancellor, Keeper of the Great Seal, was, in the case of the King neglecting to order it, to be sworn to issue writs for a new Parliament, within three years from the dissolution of the last, under pain of disability to hold his office, and further punishment; in case of his failure to comply with this provision, the Peers were enabled and enjoined to meet at Westminster, and to issue writs to the Sheriffs; the Sheriffs themselves, should the Peers not fulfil this duty, were to cause elections to

be duly made; and on their default, at a prescribed time, the electors themselves were to proceed to choose their representatives. No future Parliament was to be dissolved or adjourned without its own consent, in less than fifty days from the opening of its Session.<sup>1</sup>

**Ship Money Abolished.**—The 16 Car. I., c. 14, declared ship-money illegal, and annulled the judgment of the Exchequer Chamber against Mr. Hampden. While granting the King tonnage and poundage, it was ‘declared and enacted that it is and hath been the ancient right of the subjects of this Realm, that no subsidy, custom, impost, or other charge whatsoever, ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens, or aliens, without common consent in Parliament,’ 16 Car. I., c. 8. ‘This is the last Statute that has been found necessary to restrain the Crown from arbitrary taxation.’<sup>2</sup>

**Star Chamber Abolished.**—By the 16 Car. I., c. 10 (1641), the Star Chamber was abolished. ‘This Act abrogates all exercise of jurisdiction, properly so called, whether of a civil or criminal nature, by the Privy Council, as well as by the Star Chamber.’<sup>3</sup>

**High Commission Court Abolished.**—The 16 Car. I., c. 11, abolished the High Commission Court, and by taking from the Ecclesiastical Courts all power of inflicting temporal penalties, rendered their jurisdiction nugatory. This part of the Act was repealed after the Restoration.

<sup>1</sup> This Act was repealed on the Restoration by 1 Charles II., c. 1, which however contains a provision that Parliament shall not in future be intermitted for above three years at the most; and by 1 William and Mary, Sess. II., c. 2, it is enacted, “that Parliament shall be holden frequently.”—(See ‘Mutiny Act,’ post. p. 183.)

<sup>2</sup> Hallam, vol. ii., p. 97.

<sup>3</sup> Hallam, vol. ii., p. 98.

**Impressing.**—The 16 Car. I., c. 28, by which the King was empowered to levy troops for the suppression of the Irish Rebellion, recites in the preamble, that by the laws of this realm, none of His Majesty's subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity of the sudden coming in of strange enemies into the kingdom, or except they be otherwise bound by the tenure of their lands or possessions.

Upon these several Acts of the Long Parliament Hallam<sup>1</sup> makes two comments:

1st. They made scarce any material change in our constitution, such as it had been established and recognized under the House of Plantagenet.

2nd. By these salutary restrictions, and some new retrenchments of pernicious or abused prerogative, the Long Parliament formed our constitution, such nearly as it now exists.

**The Remonstrance.**—A section of the Commons being of opinion that the King would, upon the first favourable opportunity, reassert his despotic power, presented to him, on the 1st December, 1641, an elaborate document of 206 articles, styled the "Remonstrance of the State of the Kingdom." The discussions concerning this document furnish us with the first distinct proof of the existence of the two parties in the Commons, at a later period known as the *Parliamentary Royalists*, or *Cavaliers*, on the one hand, the *Parliamentarians*, or *Roundheads*, on the other.

The one party may have been too exacting. The disunion appeared to Charles his opportunity. On the 3rd of January, 1642, his Attorney-General, Sir Edward

<sup>1</sup> Vol. ii. pp. 101, 102.

Herbert, accused Lord Kimbolton, Pym, Hampden, Hollis, Haselrig, and Strode, at the table of the House of Lords, of treason; and on the following day, they not having been given up, the King, attended by a large guard, went to the House of Commons, with the intention of seizing them. They were not there. Charles asked the Speaker, Lenthall, where they were. Lenthall, upon his knees, replied that "*he had neither eyes to see, nor tongue to speak, but as the House commanded him.*" The King expressed his regret that "the birds had flown," at the same time assured the House that "the delinquents should have a fair trial." As he turned to leave the House, he was followed by the cries of "Privilege! Privilege!"

With the attempted seizure of the members, the *constitutional* period of this great contest may be said to terminate. From that day the *Revolution* commenced.

The royal standard was erected at Nottingham on the 22nd of August, 1642. Charles surrendered to the Scots at Newark on the 5th of May, 1646. He was handed over by them to the English on the 30th of January, 1647. He was beheaded on the 30th of January, 1649.

The Commonwealth extended from the 30th of January, 1649, till the 8th of May, 1660. That circumstances, for which the King was mainly responsible, forced Cromwell into the position he assumed; and that it was not the place of his own seeking, can scarcely be doubted. That during his sway he did much good at home, and was disposed to do more, is admitted even by his enemies. That he made the British flag respected was confessed by those who had treated it with contempt. That his rule was unconstitutional cannot be denied

even by his most ardent admirers. To refuse a national tribute to his memory is ungenerous and unjust.

That loyal and constitutional England should have soon wearied with a republic, or, more correctly, with military rule, was as natural as it was unnatural that it should be oblivious of the experience of the past. Those kings only are tyrants whose subjects are self-made slaves. To spoil a child, then to blame him for being spoiled, is to add injustice to stupidity. Prince Charles was no less wearied with his travels than was England with its so-called republic; willingly would he have accepted the throne upon conditions that could have left nothing for the nation to desire. If, then, those conditions were not imposed at the Restoration, the fault rests with the nation, not with the King.

‘Four subjects of great importance, and some of them very difficult, occupied the Convention Parliament from the time of the King’s return till their dissolution in the following December:—a general indemnity and legal oblivion of all that had been done amiss in the the late interruption of government; an adjustment of the claims for reparation which the Crown, the Church, and private royalists had to prefer; a provision for the King’s revenue, consistent with the abolition of military tenures; and the settlement of the Church.’<sup>1</sup>

**Feudal tenure abolished.**—The 12 Car. II. c. 24, enacts that the Court of Wards and Liveries, and all wardships, liveries, primer seisin, and ousterle mains, values and forfeitures of marriage, by reason of any tenure of the King or others, be totally taken away. And that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying

<sup>1</sup> Hallam, vol. ii. p. 302.

the daughter or knighting the son, and all tenures of the King *in capite*, be likewise taken away. And that all sorts of tenures, held of the King or others, be turned into *free and common socage*, save only tenures in *frankalmoign*, *copyholds*, and the *honorary services* (without the slavish part) of *grand serjeanty*.<sup>1</sup>

‘This Act may be said to have wrought an important change in the spirit of our constitution, by reducing what is emphatically called the prerogative of the Crown.’<sup>2</sup> In lieu of those feudal privileges, of considerable pecuniary value, Parliament gave the Crown an excise duty.

**Petitions to Parliament.**—By 13 Car. II. st. i. c. 5, it is enacted, that not more than twenty names shall be signed to any petition to the Crown or either House of Parliament, for any alteration of matters established by law in Church or State; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and, in London, by the lord mayor, aldermen, and common council; and that no petition shall be delivered by a company of more than ten persons. On pain, in either case, of incurring a penalty, not exceeding £100, and three months’ imprisonment.<sup>3</sup>

**Foundation of the Standing Army.**—In 1661 the troops were disbanded.<sup>4</sup> Charles, however, retained ‘General Monk’s regiment, called the Coldstream, and one other of horse, and a third was formed out of

<sup>1</sup> Steph. Com., i. p. 209.

<sup>2</sup> Hallam, Const. Hist. vol. ii. p. 311.

<sup>3</sup> Steph. Com., vol. iv. p. 335. As to this statute, see R. v. Gordon, Dougl. Rep., p. 592; see also 57 Geo. III. c. 19, s. 23, as to unlawful meetings.

<sup>4</sup> Commons’ Journals, Nov. 7.

troops brought from Dunkirk ; and thus began, under the name of "guards," the present regular army of Great Britain. In 1662, these amounted to about 5000 men.<sup>1</sup>

If we add to the rights, already enumerated as established, the perfect immunity of juries—the absolute independence of the judges—a uniform habit of impeaching corrupt ministers of the Crown—a satisfactory guarantee against false imprisonment, and—a free press, we appear to possess every essential of perfect civil liberty.

**The Immunity of Juries.**—In 1670, William Penn and William Mead, Quakers, having addressed an audience in Gracechurch Street, were prosecuted under the Conventicle Act. The Recorder of London, having failed to secure a conviction, in his exasperation, fined each of the jurymen 40 marks (£26. 13s. 4d.); this Bushell, the foreman of the jury, refused to pay. He was in consequence committed to prison. He sued out his writ of Habeas Corpus, and, on the return being made that *'he had been committed for finding a verdict against full and manifest evidence, and against the direction of the Court,'* Chief Justice Vaughan held the ground to be insufficient, and discharged him.

The determination to hold in check the advisers of the Crown was early manifested by the impeachment of Lord Clarendon, which took place in 1667. The chief charges brought against him were,—the maintenance of a standing army ; the imprisonment of British subjects beyond seas, thereby rendering it impossible for them to sue out their Habeas Corpus ; and, the sale of Dunkirk for an insufficient sum.

<sup>1</sup> Hallam, Constitutional History, vol. ii. p. 313.

**Earl Danby's Case.**—In 1678, Earl Danby was impeached for agreeing, for a pension of 6,000,000 livres to the King, that England should be neutral in the war between France and Holland. This agreement was made five days after an Act had been passed to raise money to assist the Dutch. As Charles was a party to this shameful undertaking, and consequently equally guilty, he endeavoured to screen Danby by dissolving Parliament, but his effort failed; for when the next Parliament met, on the 6th of March, 1679, the Commons resolved, (1) that a dissolution of Parliament does not stop an impeachment; and (2) that a pardon under the great seal, in bar of an impeachment, is void. Danby was committed to the Tower.

**The Habeas Corpus Act.**—In 1676, Jenkes, a citizen of London, on the popular or factious side, having been committed by the King in Council for a mutinous speech in Guildhall, the Justices at Quarter Sessions refused to admit him to bail, on the plea that he had been committed by a superior court; or to try him, because he was not entered in the calendar of prisoners. The Chancellor, on application for a Habeas Corpus, declined to issue it during the vacation; and the Chief Justice of the King's Bench, to whom, in the next place, the friends of Jenkes had recourse, made so many difficulties, that he lay in prison for several weeks. Though it may be true, as Hallam says,<sup>1</sup> that this case was not the true cause of the passing of the Habeas Corpus Act, its perusal can hardly fail to convince the reader that its provisions were materially affected by it. It may be true that no new principle was thereby introduced, but it is certain that a nominal, as shown by

<sup>1</sup> Constitutional History, vol. iii. p. 10.

Jenkes' case, was converted into an actual and an available right.<sup>1</sup>

James II., in the brief period of four years, rendered himself odious to every class of the community, not excepting the Papists, whose fortunes he seriously prejudiced by gross shortsightedness. He endeavoured to re-establish Romanism by force; he treated the adherents of Monmouth with unqualified barbarity; he discharged Halifax, his relative, from office, for becoming a Protestant; he issued ecclesiastical commissions; he imprisoned seven bishops for daring to petition him against the 'Declaration of Indulgence'; he violated the rights of the Universities, and municipal charters; he maintained a large standing army.

At the request of ninety peers, William of Orange landed, on the 5th of November, 1688. James fled. The Convention Parliament met on the 22nd of January, 1689, and on the 28th the Commons voted 'That King James II. having endeavoured to subvert the constitution of this kingdom, by breaking the original contract between King and people, and by the advice of Jesuits and other wicked persons having violated the fundamental

<sup>1</sup> The Habeas Corpus Act, 31 Car. II. c. 2 (1677), is entitled 'An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas.' Of its 20 Sections, we may mention that Section I. fixes the time within which the person imprisoned must be produced after service of the writ upon the officer detaining him. II. Determines the Judges who must grant the writ upon proper application, whether during term or vacation. III. Persons neglecting for two terms to pray a Habeas Corpus disentitle themselves to it in the vacation. IV. Defines the method in which officers disobeying the writ are to be proceeded against. V. Persons set at large can only be recommitted by Order of the Court. VIII. Regulates the removal of a prisoner from one prison to another. IX. Renders a Judge who refuses the writ liable to a penalty of £500, recoverable by, and payable to, the person imprisoned. XI. Prohibits the imprisonment of British subjects beyond the seas, &c., with a like penalty. It need hardly be stated that the Act does not apply to imprisonments after sentence.

laws, and having withdrawn himself out of the kingdom, has abdicated the Government, and that the Throne is thereby vacant.' On the following day it was voted, 'That it hath been found by experience inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince.' And on the 13th of February, 'That William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the Crown and dignity of the said kingdoms and dominions to them the said Prince and Princess, during their lives, and the life of the survivor of them ; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives ; and after their decease, the said Crown and Royal Dignity of the said kingdom and dominions to be to the heirs of the body of the said Princess ; for default of such issue, to the Princess Anne of Denmark, and the heirs of her body ; and for default of such issue, to the heirs of the body of the said Prince of Orange.'<sup>1</sup>

William accordingly summoned a regular Parliament, and the rights and liberties of British subjects were declared on the 16th of December, 1689, by the Bill of Rights.

**The Bill of Rights,**<sup>2</sup> 1 W. & M., st. 2, c. 2, enacts:—

1. That the pretended power of suspending of laws, or the execution of laws by regal authority, without consent of Parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as hath been assumed and exercised of late, is il-

<sup>1</sup> Commons' Journals, Parl. Hist.

<sup>2</sup> Founded upon the Declaration of Rights, presented by both Houses to William and Mary, on the 18th of February, 1689.

legal. 3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious. 4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal. 5. That it is the right of the subject to petition the King; and all commitments and prosecutions for such petitioning are illegal. 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is illegal. 7. That the subjects which are Protestants may have arms for their defence, suitable to their condition, and as allowed by law. 8. That election of Members of Parliament ought to be free. 9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. 10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. 11. That jurors ought to be duly empanelled and returned; and jurors which pass upon men in trials for high treason ought to be freeholders. 12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void. 13. That for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.<sup>1</sup>

**The Mutiny Act**, 1 W. and M., c. 5.—This Act was originally enacted for six months, but it has since been renewed yearly, as it endures only for a single year. It is by the provisions of this Bill that the army is held together, and subjected to military discipline. No pay

<sup>1</sup> See Creasy, *Eng. Constitution*, p. 317 *et seq.*

can be issued to the troops without a previous authorization by the Commons in a Committee of Supply; and by both Houses in an Act of Appropriation. No officer nor soldier can be punished for disobedience, nor any court-martial held, without the annual re-enactment of this Bill. Thus it is strictly true that, if the King were not to summon Parliament every year, his army would cease to have a legal existence; and the refusal of either House to concur in the Mutiny Bill would at once wrest the sword out of his grasp.<sup>1</sup>

**The Toleration Act**, 1 W. and M., st. 1, c. 18.<sup>2</sup>—This Act exempts from the penalties of existing statutes against separate conventicles, or absence from the established worship, all such as should take the oath of allegiance, and subscribe the declaration against Popery, and such ministers of separate congregations as should subscribe the Thirty-nine Articles of the Church of England, except the thirty-fourth, thirty-fifth, thirty-sixth, and a part of the twentieth. It gives also an indulgence to Quakers without this condition. Meeting-houses are required to be registered, and are protected from insults by a penalty. No part of this toleration is, however, extended to Papists, or to such as deny the Trinity.

Guizot indicates as the direct results of the Revolution—First, that the King could never again separate himself from the Parliament; Second, the House of Commons became, in effect, the preponderant branch of the Parliament; and, Third, the complete and definitive ascendancy of Protestantism.<sup>3</sup>

**The Press.**—Soon after printing was introduced into England, the liberty of the press was regulated by the King's proclamations, prohibitions, charters of license,

<sup>1</sup> Hallam, vol. iii. p. 148.

<sup>2</sup> Confirmed by 10 Anne, c. 2.

The English Revolution.

&c. Its control subsequently passed to the Star Chamber; and when that institution was abolished by the Long Parliament, that body assumed the censorship. The government of Charles II., in its turn, imitated their ordinances; and though the Licensing Act expired in 1679, it was held to be illegal to publish political news without the sanction of the Crown. That sanction, at the close of the reign of Charles II., was exclusively granted to the *London Gazette*, a small paper published on Monday and Thursday. It was not till 1694 that the censorship of the press was abolished, since which date it has remained free.<sup>1</sup> Hallam says, 'It appears to have been the received doctrine in Westminster Hall before the Revolution that no man might publish a writing reflecting on the government, nor upon the character, or even capacity and fitness, of any one employed in it.'<sup>2</sup> No change in this respect took place during the remainder of this century.

<sup>1</sup> 'The earliest authentic news-pamphlet known to exist is dated 1619, and similar papers of news were issued in the next three years, but the beginning of journalism must be dated from the time of the Long Parliament. The first English newspaper that has been discovered is a quarto pamphlet of a few leaves, containing a summary of Parliamentary proceedings for an entire year: it is entitled, "The Diurnal Occurrences, or Daily Proceedings of Both Houses, in this great and happy Parliament, from the 3rd of November, 1640, to the 3rd of November, 1641." It is said that more than a hundred papers with different titles appear to have been published between this date and the death of the King, and more than eighty others between that event and the Restoration. The papers were, at first, issued weekly; but as the anxiety of the people increased they were published twice or thrice a week; and Spalding, the Aberdeen annalist, mentions that in December, 1642, "printed papers daily came from London, called *Diurnal Occurrences*, declaring what was done in Parliament." In addition to newspapers, the important questions that agitated the public mind were discussed in an immense number of pamphlets, of which no less than thirty thousand are stated to have been printed in the twenty years from the Long Parliament to the Restoration, being at the rate of four or five new ones daily.'—(Curtis, p. 321.)

**The Cabinet.**—During the reign of William III., a very remarkable alteration in the Executive Government, which had silently crept in since the Restoration, became a recognized institution. This was the Cabinet. From the Accession of William I., the King had always had his Privy Council, composed of the great officers of State, and of such other persons as he thought fit to summon to it. With these Privy Counsellors who were sworn to fidelity and secrecy, he discussed matters of State policy, and in most instances adopted the course approved by the majority. In this body, always more or less numerous, it was natural that the King should find certain members in whom he reposed special confidence, and with whom he privately discussed matters before submitting them to the General Council. We find the term *Cabinet Council* applied to these special confidants as early as the reign of Charles I. It was not, however, till the Restoration, till the fall of Clarendon indeed, that the King, with this Cabinet Council, finally determined matters without discussing them with the Privy Council, simply submitting their decisions to that body for formal ratification; and it was not till the reign of William III. that this course of proceeding became the settled practice. In that reign, the two bodies became distinct, the Privy Council being practically excluded from all business of State. The office of Privy Counsellor, as distinct from that of Cabinet Minister, became reduced to a mere titular distinction, conferring the title of *Right Honorable*. Royal proclamations and orders still emanate, as the law requires, from the Privy Council; but by long-established usage, no Privy Counsellor, though he has the unquestionable

right to attend, now does so, unless specially summoned.

'The Ministry,' says Lord Macaulay, 'is, in fact, a Committee of leading members of the two Houses. It is nominated by the Crown: but it consists exclusively of statesmen, whose opinions on the pressing questions of the time agree, in the main, with the opinions of the majority of the House of Commons. Among the members of this Committee are distributed the great departments of the Administration. Each Minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of every office, and especially such business as is likely to be the subject of discussion in Parliament, is brought under the consideration of the whole Ministry. In Parliament, the Ministers are bound to act as one man on all questions relating to the Executive Government. If one of them dissents from the rest on a question too important to admit of compromise, it is his duty to retire. While the Ministers retain the confidence of the Parliamentary majority, that majority supports them against opposition, and rejects every motion which reflects on them, or is likely to embarrass them. If they forfeit that confidence, if the Parliamentary majority is dissatisfied with the way in which patronage is distributed, with the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. It is not necessary that the Commons should take on themselves the business of Administration, that they should request the Crown to make this man a Bishop and that man a Judge, to pardon one criminal and to execute another, to negotiate a treaty on a particular basis, or to send an expedition to a particular

place. They have merely to declare that they have ceased to trust the Ministry; and to ask for a Ministry which they can trust.<sup>1</sup>

The Executive Government, though nominally vested in the Crown, is now practically in the Cabinet, the members of which are sworn 'to advise the King according to the best of their cunning and discretion,' and 'to help and strengthen the execution of what shall be resolved.'

As the acts of the Ministry are liable to be questioned in Parliament, and require prompt explanation, the members of the Cabinet invariably have seats in either the Upper or the Lower House, where they become identified with the general policy and acts of the Government.

The member of the Cabinet who fills the situation of First Lord of the Treasury, and combines with it sometimes that of Chancellor of the Exchequer, is the chief of the Ministry, and therefore of the Cabinet. It is at his recommendation that his colleagues are appointed. Every Cabinet includes the following ten members:—the First Lord of the Treasury, the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Exchequer, and the five Secretaries of State. A number of other ministerial functionaries, varying from five to eight, have usually seats in the Cabinet, those most frequently admitted being the Chief Commissioner of Works and Buildings, the Chancellor of the Duchy of Lancaster, the First Lord of the Admiralty, the President of the Board of Trade, Vice-President of the Privy Council, the Postmaster-General, the Chief Secretary for Ireland, and the President of the Poor Law Board.<sup>2</sup>

<sup>1</sup> History of England, vol. iv. p. 437.

<sup>2</sup> Statesman's Year-Book, p. 204.

Although the Cabinet has now long been regarded as an essential part of our institutions, it still continues to be unknown to the law. The names of the members who compose it are never officially announced ; no record is kept of its resolutions or meetings, nor has its existence been recognized by any Act of Parliament.

Hallam, who regards with dissatisfaction the irresponsible position of the members of the Cabinet, says, 'this—the displacement of the Privy Council by the Cabinet—however, produced a serious consequence as to the responsibility of the advisers of the Crown ; and at the very time when the controlling and chastising power of Parliament was most effectually recognized, it was silently eluded by the concealment in which the objects of its inquiry could wrap themselves. Thus, in the instance of a treaty which the House of Commons might deem mischievous and dishonorable, the Chancellor, setting the Great Seal to it, would of course be responsible : but it is not so evident that the First Lord of the Treasury, or others more immediately advising the Crown on the course of Foreign policy, could be liable to impeachment, with any prospect of success, for an act in which their participation could not be legally proved. I do not mean that evidence may not possibly be obtained which would affect the leaders of the Cabinet, as in the instances of Oxford and Bolingbroke ; but that, the Cabinet itself having no legal existence, and its members being surely not amenable to punishment in their simple capacity of Privy Counsellors, which they generally share in modern times, with a great number even of their adversaries, there is no tangible character to which responsibility is

attached; nothing, except a signature or the setting of a seal, from which a bad Minister need entertain any further apprehension than that of losing his post and reputation. It may be that no absolute corrective is practicable for this apparent deficiency in our constitutional security; but it is expedient to keep it well in mind, because all Ministers speak loudly of their responsibility, and are apt, upon faith of this imaginary guarantee, to obtain a previous confidence from Parliament which they may in fact abuse with impunity. For should the bad success or detected guilt of their measures raise a popular cry against them, and censure or penalty be demanded by their opponents, they will infallibly shroud their persons in the dark recesses of the Cabinet, and employ every art to shift off the burthen of individual liability.<sup>1</sup>

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#### EIGHTEENTH CENTURY—1700 to 1799.

*William III.*, 1700 to 1702. *Anne*, 1702 to 1714. *George I.*, 1714 to 1727. *George II.*, 1727 to 1760. *George III.*, 1760 to 1820.

Intimately, indeed inseparably, connected with the history of the Cabinet is that of the Parties—Whigs and Tories, more modernly Liberals and Conservatives. The year 1714 may be fixed as the commencement of a new era in the Constitutional History of England, an era characterized by a new Dynasty—the House of Brunswick; new contending parties—the Whigs and the Tories; a new institution—the Cabinet.

<sup>1</sup> Const. Hist. vol. iii. p. 183.

For though, as we have already seen, the origin of the Cabinet must be assigned to the last, its full operation belongs to this century. And though, as will immediately appear, the terms Whig and Tory were first applied to contending parties in the last, it is to this century that we must look for the origin and foundation of what we now understand as the parties distinguished by those appellations. Before, however, attempting to enter upon this subject, we must notice the Act of Settlement.

**The Act of Settlement**, 12 and 13 William III., c. 2, dated the 12th of June, 1701, and intended to take effect in the event of there being no surviving issue of William and Mary, of the Princess Anne, or of William—an event which happened in 1714, when the Crown passed to the House of Brunswick,—contains the following eight articles:—

1. That whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England as by law established.

2. That in case the Crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament.

3. That no person who shall hereafter come to the possession of this Crown, shall go out of the dominions of England, Scotland, or Ireland, without consent of Parliament.<sup>1</sup>

4. That from and after the time that the further limitation by this Act shall take effect, all matters and

<sup>1</sup> Repealed in 1714.

things relating to the well governing of this kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there; and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same.<sup>1</sup>

5. That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen—except such as are born of English parents), shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown, to himself or to any other or others in trust for him.

6. That no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.<sup>2</sup>

7. *That after the said limitation shall take effect as aforesaid, Judges' Commissions be made quamdiu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them.*<sup>3</sup>

<sup>1</sup> Intended to correct the evil of the Cabinet system already explained. This clause was however repealed during the reign of Anne.

<sup>2</sup> Repealed in 1706. Another Act was passed soon after, which provides that if a member of the House of Commons accepts an office under the Crown, higher rank in the army excepted, he must vacate his seat, but may be re-elected. The same Act contains provisions against the multiplication of placemen.

<sup>3</sup> Heretofore the King could remove a Judge at his pleasure; the consequence was that unscrupulous Judges, rather than endanger their seats on the Bench, prostituted their sacred office in the most infamous manner.—See Phillimore's *History and Principles of the Law of Evidence*.

8. That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.

**The Parties.**—The origin of the parties is variously stated. By some historians it is traced to the reign of James I. It is true that, from the commencement of the struggle between the Stuart kings and their Parliaments, two parties are almost constantly before us—those who support the Crown, and those in conflict with it. Thus we see the Court and Country parties; the Roundheads and Cavaliers; the Republicans and the partisans of absolute power; the advocates of passive obedience, and the repudiators of the doctrine of the Divine right of kings. But in this sense we might go back to our starting-point. There have always been parties, but those contending elements are not what we understand by the term *The parties*. In 1679, one faction dreading the accession of James, an avowed Papist, pressed upon the King the necessity of calling a Parliament in order that it might proceed with the Exclusion Bill, the object of which was to deprive James of his right to succeed to the Crown upon the demise of his brother. Another faction, not feeling the same uneasiness concerning James, maintained that the attempt to coerce Charles to call a Parliament, the avowed object being to make him a party to the exclusion of his brother from the Throne, was an encroachment upon the Prerogative. These rival factions respectively branded each other, first with the epithets '*Petitioners*' and '*Abhorrrers*,' afterwards with those of '*Whigs*'<sup>1</sup> and

<sup>1</sup> The word '*Whig*,' says Defoe, is Scotch. The use of it began when the Western men, called Cameronians, took arms, frequently, for their religion. *Whig* was a word used in those parts, for a kind of liquor the western Highlandmen used to drink, and so became com-

'*Tories*.'<sup>1</sup> James, as the reader knows, ascended the Throne in 1685, and between that date and 1689 so completely realized the worst fears entertained concerning him, that both parties united in expelling him from the Throne, in the bringing in of William and Mary, and in the declaration of the constitutional prerogative of the Crown, and the rights of the subject, by the celebrated Declaration and Bill of Rights and by the Act of Settlement.

Under William and Anne, the Government, with the exception of the alteration in the matter of the Cabinet,

mon to the people who drank it. It afterwards became a denomination of the poor harassed people of that part of the country, who, being unmercifully persecuted by the Government against all law and justice, thought they had a civil right to their religious liberties, and therefore resisted the power of the Prince (Charles II.) They took arms about 1681, being the famous insurrection of Bothwell Bridge. The Duke of Monmouth, then in favour here, was sent against them by Charles, and defeated them. At his return, instead of thanks for his good service, he found himself ill-treated for having used them too mercifully; and Duke Lauderdale told King Charles, with an oath, that the Duke had been so civil to the Whigs because he was a Whig himself in his heart. This made it a Court word, and in a little time the friends and followers of the Duke began to be called Whigs; and they, as the other party did by the word *Tory*, took it freely enough to themselves.

<sup>1</sup> Defoe says,—'The word *Tory* is Irish, and was first used in Ireland at the time of Queen Elizabeth's war, to signify a robber who preyed upon the country. In the Irish Massacre (1641), you had them in great numbers, assisting in everything that was bloody and villainous; they were such as chose to butcher brothers and sisters, fathers and mothers, the dearest friends, the nearest relations. In England, about 1680, a party of men appeared among us, who, though pretended Protestants, yet applied themselves to the ruin of their country. They began by ridiculing the Popish Plot, and encouraging the Papists to revive it. They pursued their designs in banishing the Duke of Monmouth, and calling home the Duke of York (James II.); then in abhorring petitioning, and opposing the Bill of Exclusion; in giving up charters, and the liberties of their country, to the arbitrary will of their Prince; then in murdering patriots, persecuting dissenters, and at last in setting up a Popish prince on pretence of hereditary right, and tyranny on pretence of passive obedience. These men began to show themselves so like the Irish thieves and murderers aforesaid, that they quickly got the name of *Tories*.' (Review, vol. vii.)

was conducted as heretofore. Till the year 1693, William avoided exhibiting any decided preference for either Whigs or Tories; but in that year, Sunderland, his confidential counsellor, persuaded him that it was necessary that his Ministers should act as a party; and as it was necessary that they should possess strong Parliamentary support, he suggested the expediency of selecting the Whigs, at that time the more popular, owing to their more active attachment to the principles of the Revolution, and their avowed hatred of the Papacy, — a sentiment the intensity of which had been greatly heightened in the public mind by the conduct of James II., both while on the Throne and after, and by that of France and Ireland. The result was, that Somers, Wharton, Russell, Charles Montague, and shortly after Shrewsbury, became the chief officers of the Crown.

The fact, however, that William concluded with Louis of France the first Spanish partition treaty on October 11, 1698, without even asking the advice of his ministers, is sufficient to show the extent of their influence in matters of state.

The impeachment of Sacheverel,<sup>1</sup> in 1709, again

<sup>1</sup> An obscure divine, who had preached and published two sermons, respectively entitled "The Communication of Sin," and "The Perils of False Brethren in Church and State," in which the doctrine of passive obedience was inculcated, all toleration reprobated, the Church declared to be in danger from false brethren and the perfidious Volpone (a term supposed to apply to Lord Godolphin), and the general principles of the Revolution impugned. The Commons voted that "the two sermons were malicious, scandalous, and seditious libels, highly reflecting upon the Queen and her Government, the late happy Revolution, and the Protestant succession." Sacheverel was impeached of high crimes and misdemeanours. The trial was conducted in Westminster Hall; the chief managers on behalf of the Commons were Stanhope, Walpole, Jekyll, Lechmere, and King. In able and eloquent speeches they vindicated and justified the Revolution, and showed that it was based on resistance. "As to the doctrine itself of

brought the two theories of Government, which formed the original distinction between the Whigs and Tories, into collision, and, combined with some bed-chamber intrigues and quarrels, resulted in the appointment of a Tory ministry, at the head of which were Bolingbroke and Oxford.

‘The accession of the House of Hanover,’ says the *Edinburgh Review*, a Whig Journal, (vol. xxxvii. p. 21,) ‘divided England into two parties, the Whigs, or friends of the new establishment, and the Tories and Jacobites, its secret or avowed opponents. The Tories, bigoted to the notion of indefeasible right in the succession to the crown, but apprehensive for their religion if a Papist should mount the throne, were distracted between their scruples about the validity of a parliamentary settlement, and their fears lest, in subverting it, they might restore, or pave the way for the restoration of the Catholic Church. Though deterred by their religious fears from embarking decidedly in the cause of the Pretender, they kept on terms with

non-resistance,” said General Stanhope, “it should seem needless to prove by arguments that it is inconsistent with the law of reason, with the law of nature, and with the practice of all ages and countries. There is not at this day subsisting any nation or government in the world, whose first original did not receive its foundation either from resistance or compact; and as to our purpose, it is equal if the latter be admitted. For wherever compact is admitted, there must be admitted, likewise, a right to defend the rights accruing by such compact.” The Lords, by a majority of 69 to 52, declared the defendant guilty; and the judgment pronounced was that he should be suspended for three years, and that his sermons should be burnt by the common hangman (March, 1710). The lightness of the sentence was regarded as a triumph; and the popular enthusiasm in his behalf exhibited itself in bonfires, bell-ringing, and the destruction of some dissenting meeting-houses. Three of the rioters, Dammaree, Purchase, and Willis, were tried for treason, “in levying open war against Her Majesty,” and the two former were condemned; but they were afterwards reprieved and pardoned, “possibly owing to an opinion, which every one but a lawyer must have entertained, that their offence did not amount to treason.” (Curtis, p. 393.)

his friends, and were not unwilling to disturb, though they hesitated to overturn, a Government they disliked, because it was founded on principles they abhorred. The Jacobites, though most of them were zealous members of the Church of England, had a stronger infusion of bigotry in their composition, and were ready to restore a Popish family, and submit to a Popish sovereign, rather than own a Government founded on a Parliamentary title. It was impossible that either Tories or Jacobites should have the confidence of the Hanoverian princes ; and, therefore, while those divisions subsisted, all places of power and profit were in the hands of the Whigs. Of these two parties, the Tories and Jacobites were the most numerous. They included a certain number of the ancient nobility, and comprehended a very large proportion of the landed interest, and what gave them a prodigious influence in those days, a vast majority of the parochial clergy. The strength of the Whigs lay in the great aristocracy, in the corporations, and in the trading and moneyed interests. The Dissenters, who held Popery in abhorrence, and dreaded the overbearing spirit of the Church, were warmly attached to a Government that protected their religious liberty, and, as far as it durst, extended to them every civil right. It has, perhaps, been fortunate in its results for England, that her Church was for so many years in hostility to her Government. It was during this temporary dissolution of the vaunted alliance between Church and State, that religious freedom, such as it exists among us, struck so deep and vigorous a root, as to withstand every subsequent effort to blight or subvert it. It was during this period that the annual Indemnity Bills were introduced,

which, though they have left the stigma, have taken from the Test Act its sting; and it was during the same period that the Toleration Act received, in practice, that liberal interpretation which extends its benefits to every possible sect of Christians, the unhappy Catholics alone excepted.<sup>1</sup> This protracted struggle between the adherents of the House of Hanover and the partisans of the Stuarts, was not, however, unattended with disadvantages. It confounded, for a time, the ancient distinctions of Whig and Tory, which had turned on constitutional differences of real and eternal importance, and converted two political sects, or parties, into two factions contending for the Crown. The Tories, forced to remain in opposition to the Government, learned to ape the language, and ended by adopting many of the opinions, of their adversaries. The Whigs, believing the preservation of their liberties depended on the maintenance of the parliamentary settlement of the Crown, and finding themselves in a minority in the country, were constrained to employ measures, and sanction proceedings, from which their ancestors would have recoiled. To counteract the local influence of the gentry, they practised and encouraged corruption, both within Parliament and without, and thus turned against their enemies the weapon they had invented under the Stuarts. To suppress tumults of the rabble, instigated by the vehicles of Tory sentiment, annually exported from Oxford, and dispersed

<sup>1</sup> By Plunkett's Catholic Relief Bill, 1821; the Roman Catholic Relief Bill, 1829; the Roman Catholics Penal Acts Bill, and the Dissenters Chapels Act, 1844; the Ecclesiastical Titles Act, 1851; the Jews Oath Act, 1858, &c.; and particularly by the growing conviction in the public mind, that a nation whose flag protects believers in every creed upon earth, is disgraced by intolerance to any—this evil is rapidly disappearing.

over the kingdom, they armed the magistrates with additional, and, till then, unknown powers; and, to defeat the enterprises of foreign princes, acting in conjunction with the disaffected at home, they maintained a standing army in time of peace.'

On the accession of the House of Hanover, the Riot Act was passed, the Triennial Act repealed, and the Habeas Corpus Act suspended by the Whigs. A shameless system of corruption and laxity of political principle was introduced, the whole extent of which has but recently been fully exposed to public view.

Hallam says, 'Without going farther back, we know that Henry VII., Henry VIII., Elizabeth, the four Kings of the House of Stuart, though not always with as much ability as diligence, were the *master movers* of their own policy, not very susceptible of advice, and always sufficiently acquainted with the details of government to act without it. This was eminently the case also with William III., who was truly his own minister, and much better fitted for that office than those who served him.'<sup>1</sup> Omitting the observation as to *fitness*, the same may be said of Anne.

But on the accession of the House of Hanover, this personal superintendence of the Sovereign came to an end. George I. could not speak the English language; he was neither familiar with English politics nor with English character; such being the case, he wisely entrusted to his ministers the entire management of his new kingdom. In this respect he was to so large an extent imitated by his son, that it may be said, that for forty-six years the *personal authority* of the Crown was im-

<sup>1</sup> Constitutional History, vol. iii. p. 289.

perceptible. The terms Whig and Tory, which theretofore had been little more than the mere war-cries of rival factions, the supporters of one of two peculiar theories, now became the names of the two parties into which all England was, or was supposed to be, divided,—names by one of which every Englishman was supposed to be describable—the names of the two cabinets, by one of which England was governed. ‘It became the point of honour among public men to fight uniformly under the same banner, though not perhaps for the same cause; if, indeed, there was any cause really fought for but the advancement of a party.’<sup>1</sup> The Cabinet in power then, and ever since, has depended upon the strength of its party in the House of Commons; the strength of that party in the House of Commons, upon the popularity at the date of its election, outside the House, of its professed policy for the time being, or upon the confidence felt by the nation in the capacity and integrity of the leading men of the party.

The exercise of the personal authority, once suspended for so long a period, for ever lost its power for mischief with a cabinet composed of men to whom honour and patriotism are of more esteem than place. To attempt to notice the various ministries, to whom, and not to the Crown, since the accession of the House of Hanover, must be ascribed the praise or censure due to the government of England, would be foreign to the province of this sketch, the object of which has been to lay as succinctly as possible before the reader the steps by which the Constitution of England has arrived at its present condition, a condition for which

<sup>1</sup> Hallam, *Constitutional History*, vol. iii. p. 291.

every Englishman should be sincerely grateful, and of which he may be justly proud ; for the intelligence which will enable him to realize the past and the present, and to compare the two, take what period he may, cannot fail to do justice to the memory of those British patriots, nobles and commoners, who by their devotion, too often at the dearest cost, have secured to us the advantages, without the evils, of a republican form of government, coupled with the benefits, unimpaired by the disadvantages, of royalty and aristocracy.

Like the terms Whig and Tory, the terms ' Liberal ' and ' Conservative ' are, at the present day, meaningless. They describe no policy, represent no set of political opinions. The terms A's and B's would be as descriptive, and less pernicious ; for while it cannot be questioned that the best men of each party are firm supporters of all the fundamental principles of the constitution, while it is certain that they would instantly and cordially unite to defend those principles, and to save the constitution from violence,—it is equally true that while, under the Tory banner, are to be found the most mulish of obstructives, under the Liberal flag are collected the most illiberal and unconstitutional of our fellow-countrymen.

## NINETEENTH CENTURY.

*George III.*, 1760 to 1820.*George IV.*, 1820 to 1830.*William IV.*, 1830 to 1837.*Victoria*, 1837.

My comment upon the nineteenth century will be confined to a statement of the present aspect of the Constitution—a statement which I have extracted from the *Statesman's Year-Book*<sup>1</sup> for 1872, but from which I have omitted such matter as has already been dealt with:—

Parliament is summoned by the writ of the Sovereign, issued out of Chancery, by advice of the Privy Council, at least thirty-five days previous to its assembling.

On a vacancy occurring whilst Parliament is sitting, a writ for the election of a new member is issued upon motion in the House. If the vacancy occurs during the recess, the writ is issued at the instance of the Speaker.

It has become customary of late for Parliaments to meet in annual session, extending over the first six months of the year. Every session must end with a prorogation, and by it all bills which have not been brought to a conclusion fall to the ground. Both Houses of Legislature must be prorogued at the same time. The prorogation takes place either by the Sovereign in person, or by commission from the Crown, or by proclamation. The Lower House appears at the bar, and if the Sovereign be present, the Speaker reports upon the labours of the session; the royal assent

<sup>1</sup> By Mr. Frederick Martin, p. 195 *et seq.*

is then given to bills of the closing session, and a speech from the Sovereign is read; whereupon the Chancellor prorogues the Parliament to a given day. Parliament resumes business, however, as soon as it is summoned by royal proclamation on a certain day, which may be at a date earlier than the original date of prorogation appointed. Should the term of prorogation elapse, and no proclamation be issued, Parliament cannot assemble of its own accord. The royal proclamation which summons Parliament in order to proceed to business, must be issued six days before the time of meeting. A dissolution is the civil death of Parliament. It may occur by the will of the Sovereign, expressed in person or by Commissioners; or, as is most usual during the recess, by proclamation; or, finally, by lapse of time. Formerly, on the demise of the Sovereign, Parliament stood dissolved by the fact thereof; but this was altered in the reign of William III. to the effect of postponing the dissolution till six months after the accession of the new Sovereign; while the Reform Act of 1867 settled that 'the Parliament in being at any future demise of the Crown shall not be determined by such demise, but shall continue as long as it would otherwise have continued unless dissolved by the Crown.' Other statutes enact that if, at the time of the demise, the Parliament be adjourned or prorogued, it shall immediately assemble; and that, in the case of the demise of the Sovereign between the dissolution of a Parliament and the day appointed by the writs of summons for the meeting of a new one, the last preceding Parliament shall immediately convene for six months, unless sooner prorogued or dissolved by the successor.

**The Upper House** consists of peers who hold their seats—1st, By virtue of hereditary right; 2nd, by creation of the Sovereign; 3rd, by virtue of office—English bishops; 4th, by election for life—Irish peers; 5th, by election for the duration of a Parliament—Scottish peers. Every hereditary peerage confers the right of a seat in the Upper House. Any person giving proof that his ancestor was called by ‘writ of summons’ may claim to sit as hereditary peer. New peerages are created by royal patent, the peer being summoned by the writ issued in pursuance thereof ‘ad consulendum et defendendum regem’; and the peerage rights are acquired whether the individual summoned takes his seat in the Upper House or not. Should a question arise as to the legal capacity of a peer to be admitted to the sittings of the Upper House, the Sovereign is prayed for a writ through a Secretary of State; the Attorney-General supports the petition, and, if willing to allow it, it is ordinarily complied with. If the matter is doubtful, he recommends it to be referred to the Upper House, which resolves itself into a Committee of Privilege. Upon a report to the House, the latter declares its opinion by way of address. Hereditary peers may, by a ‘standing order’ of the Upper House, take their seat without further preliminary; peers newly created or summoned have to be ‘introduced.’ The privilege of the members of the Upper House, including the bishops, of voting by proxy, was suspended by a ‘standing order’—No. xxxii.—passed, on the motion of the Lord Privy Seal, on the 31st of March, 1868.

The Crown is unrestricted in its power of creating peers, and the privilege has been largely used by modern Governments to fill the House of Lords. In

consequence of certain terms in the Act of Union—5 Anne, c. 8—limiting the right of election of the Scottish representative peers to the then existing peers of Scotland, it is understood that the Sovereign cannot create a new Scottish peerage; and such peerages are, in fact, never created except in the case of the younger branches of the Royal family, though extinct peerages may be revived, or forfeited peerages restored. By the Irish Act of Union—39 and 40 Geo. III., c. 67—the Sovereign is restricted to the creation of one new Irish peerage on the extinction of three of the existing peerages; but when the Irish peerages are reduced to one hundred, then on the extinction of one peerage another may be created.

The House of Lords, in the Session of 1871, consisted of 476 members, of whom 4 were peers of the blood royal, 2 archbishops, 20 dukes, 19 marquesses, 109 earls, 23 viscounts, 24 bishops, 231 barons, 16 Scottish representative peers, and 28 Irish representative peers. The list included a number of minors, and several peers whose names appear in double, on the 'Roll of the House of Lords,' as representatives of official, together with hereditary dignities.

The three oldest existing peerages date from the latter part of the thirteenth century; four go back to the fourteenth, and seven to the fifteenth century; but more than two-thirds of the existing hereditary peerages have been created during the present century.

**The Lower House of Legislature**, representing in constitutional theory all the "Commons of England," has consisted, since 49th Henry III., of knights of the shire, or representatives of counties; of citizens, or representatives of cities; and of burgesses, or representatives of boroughs, all of whom indistinctly vote to-

gether. Since the enactment of the statute 8th Henry VI., c. 7, in the year 1429, regulating the election of knights of the shire, numerous Acts have been passed for the election of Members of Parliament. Previous to that statute, the Crown had a very large and absolute power in limiting and prescribing, by Royal writs, the numbers and qualifications of the persons to be elected, as well as of the constituencies. However, the distribution of the franchise in counties has always been far less variable and irregular than in boroughs, in nearly all cases, two members being elected for each county. For cities and boroughs, the constituencies varied greatly from time to time; and in incorporated boroughs, depended chiefly on ancient customs, and the terms of old charters and privileges. The number of cities and boroughs for which writs were issued in the time of Edward I., and thence to Edward IV., appears to have been 170. At the accession of Henry VIII., the total number of constituencies, including counties, had become reduced to 147. In that reign, the number was considerably increased, chiefly by the addition of representatives for Wales. In all the following reigns, up to the Restoration, large additions to the borough franchises were made. From the time, that Members of Parliament ceased to be paid by their constituencies, many ancient boroughs, which had formerly excused themselves from returning Members on the plea of poverty, became desirous of resuming

<sup>1</sup> 'The latest entries of writs for expenses in the Close Rolls are of 2 Hen. V.; but they may be proved to have issued much longer; and Prynn traces them to the end of Henry VIII.'s reign (p. 495). Without the formality of this writ, a very few instances of towns remunerating their burgesses for attendance in Parliament are known to have occurred in later times. Andrew Marvel, Member for Kingston-upon-Hull from 1660—1678, is commonly said to have been the last who received this honourable salary.' (Hallam, *Middle Ages*, vol. iii. p. 115.)

their franchises. The additions from Edward VI. to Charles I. were almost entirely of borough members. In the fourth Parliament of Charles I., the number of places in England and Wales for which returns were made, exclusive of counties, amounted to 210; and in the time of the Stuarts, the total number of members of the House of Commons was about 500. The number of members was not materially altered from that time until the union with Scotland, in the reign of Queen Anne, when 45 representatives of Scotland were added. The next considerable change was at the union with Ireland, at the commencement of the present century, when the House of Commons was increased by 100 Irish representatives. The number of Members of the House since that period has remained nearly the same, fluctuating around the figure 650, with a slight tendency to gradual increase, through the extension of the suffrage, and the formation of new classes of constituencies, such as Universities.

By the statute of 2nd William IV. c. 45, commonly called the Reform Bill of 1832, the English county constituencies were increased from 52 to 82, by dividing several counties into separate electoral divisions, and the number of county members was augmented from 94 to 159. On the other hand, 56 English boroughs, containing a population, in 1831, of less than 2,000 each, and returning together 111 members, were totally disfranchised; while 30 other boroughs, containing a population of less than 4,000 each, were reduced to sending one representative instead of two; 22 new boroughs, however, containing each 25,000 inhabitants, received the franchise of returning 2 members; and 20 other new boroughs, containing each 12,000 inhabitants and upwards, that of returning one member.

The next great change in the constituency of the House of Commons was made by the Reform Bill of 1867—68. The most important provisions of the new Act as regards England, are clauses 3 and 4; the first establishing household suffrage in boroughs, and the second, occupation franchise in counties. Clause 3 enacts that 'Every man shall be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows:—1. Is of full age, and not subject to any legal incapacity. 2. Is on the last day of July in any year, and has during the whole of the preceding 12 calendar months, been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough. 3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates made for the relief of the poor in respect of such premises. 4. Has, before the 20th day of July in the same year, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates that have become payable by him in respect of the said premises, up to the preceding 5th day of January, and which have been demanded of him in manner hereinafter mentioned; or, as a lodger, has occupied, in the same borough, separately, and as sole tenant for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of £10 or upwards, and has resided in such lodgings during the twelve months immediately preceding the last day of July, and has

claimed to be registered as a voter, at the next ensuing registration of voters: provided 'that no man shall, under this section, be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house.' Clause 4 enacts that every man shall be entitled to be registered as a voter, and, when registered, to vote for a member, or members, to serve in Parliament for a county, who is qualified as follows:—(1) Is of full age, and not subject to any legal incapacity; and who shall be seised at law or in equity of any lands or tenements, of copyhold or any other tenure whatever, except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate of the clear yearly value of not less than five pounds over and above all rents and charges payable out of or in respect of the same, or who shall be entitled, either as lessee or assignee, to any lands or tenements of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than £5 over and above all rents and charges payable out of or in respect of the same; (2) Is, on the last day of July in any year, and has, during the twelve months immediately preceding, been the occupier, as owner, or tenant, of lands or tenements, within the county, of the rateable value of £12 or upwards; (3) Has, during the time of such occupation, been rated, in respect to the premises so occupied by him, to all rates made for the relief of the poor in respect of the said premises; and, (4) Has, before the 20th day of July in the same year, paid all poor rates that have become payable by him in respect of the said premises up to the preceding 5th day of January.

The result of the Reform Act of 1868, in enlarging the constituencies, is shown in the following tabular statement, which gives the total number of electors, in boroughs and counties of England and Wales, in 1868 and in 1866:—

*Electors of England and Wales.*

	1868.	1866.	Increase.
Boroughs .....	1,220,715	514,026	706,689
Counties .....	791,916	542,633	249,283
Total.....	2,012,631	1,056,659	955,972

The Reform Acts for Scotland and Ireland, passed in the Session of 1868, differ in some important respects from that of England.

The Reform Bill of 1867—68 left in force all the old legal requirements for electors. Under them, aliens, persons under twenty-one years of age, of unsound mind, in receipt of parochial relief, or convicted of felony and undergoing a term of imprisonment, are incapable of voting. No one can be a Member of Parliament who has not attained the age of twenty-one years, and no excise, custom, stamp, or other revenue officer is eligible. All the judges of the United Kingdom, except the Master of the Rolls in England, priests and deacons of the Church of England, ministers of the Church of Scotland, Roman Catholic clergymen, Government contractors, and sheriffs and returning officers for the localities for which they act, are also disqualified. No English or Scottish Peer can be elected to the House of Commons, but Irish Peers are eligible. No foreigners, and no persons convicted of treason or felony, are eligible for seats in Parliament.

To preserve the independence of Members of the House of Commons, it was enacted, as we have already seen, by Statute 6 Anne, that, if any member shall accept any office of profit from the Crown, his election shall be void, and a new writ issued; but he is eligible for re-election, if the place accepted be not a new office, created since 1705. This provision has been made the means of relieving a Member from his trust, which he cannot resign, by his acceptance of the stewardship of the Chiltern Hundreds, a nominal office in the gift of the Chancellor of the Exchequer.

The present House of Commons consists of 658 Members, returned as follows by the three divisions of the United Kingdom :—

## ENGLAND AND WALES.

	Members.
52 Counties and Isle of Wight .....	187
200 Cities and Boroughs .....	301
3 Universities .....	5
Total of England and Wales ...	493

## SCOTLAND.

33 Counties .....	32
22 Cities and Burgh Districts.....	26
4 Universities .....	2
Total of Scotland .....	60

## IRELAND.

32 Counties .....	64
33 Cities and Boroughs .....	39
1 University .....	2
Total of Ireland .....	105
Total of United Kingdom .....	658

The powers of Parliament are politically omnipotent within the United Kingdom and its colonies and dependencies. Parliament can make new laws, and enlarge, alter, or repeal those existing. The parliamentary authority extends to all ecclesiastical, temporal, civil, or military matters, as well as to the altering or changing of the constitution of the realm. Parliament is the highest court of law, over which no other has jurisdiction.

## CHAPTER IV.

## INTERNATIONAL LAW.

IN this chapter, we have to deal with man as a cosmopolitan—a citizen of the world; but though a citizen of the world, not the less a member of some particular political society. Relatively to the rest of mankind, he, with the other members of that political body, constitutes a unit. Relatively to those other members, he is either *sovereign* or *subject*. In his cosmopolitan attitude, every man has thus a double character—a *general* and a *particular* citizenship. He is bound to his particular citizenship by the tie of *sovereign* or *subject*; his position, his duties, and his rights therein are defined by the constitutional and the municipal law of his land—of his nationality. As the *sovereign* of a political body, he cannot be bound by any positive laws; his relationship to other sovereigns is that of natural or sovereign independence; he can enter into what agreements, make what promises he thinks fit, but if he violates his agreements, or breaks his promises, the injured has no redress save *force*. As the *subject* of a political body, his position is different; for though the agreements made between sovereigns are not laws as between them, yet so long as those agreements exist, they are laws, and are as binding upon their respective subjects as any other law imposed

by the sovereign upon his subjects. When, for example, it was agreed between the sovereigns who took part in the Congress of Paris in 1856, that '*the neutral flag covers the enemy's merchandise, with the exception of contraband of war*,' the declaration of the 16th of April to that effect became the positive law, binding upon all the subjects of the several powers, the parties to that undertaking.

**Basis of the Science of International Law.**—The basis, then, upon which the whole science of International Law is erected may be thus stated:—There is no *positive law* by which the conduct of independent sovereigns is regulated; the agreements, however, whether tacit or express, of independent sovereigns, is the law of their respective subjects.<sup>1</sup>

To understand, then, what International Law is, we must ascertain what customs and agreements, *tacit* or *express*, exist between the sovereign powers of the earth. To learn which of those customs and agree-

<sup>1</sup> Austin, Lord Mackenzie, and others appear, when treating of this subject, to have narrowed their observation to the first element of this proposition—the agreements of sovereigns as affecting themselves. Thus Austin says,—‘A few species of the laws which are set by general opinion, have gotten appropriate names. For example, there are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour, or the laws or law of honour*. There are laws or rules imposed upon people of fashion, by opinions current in the fashionable world; and these are usually styled *the law set by fashion*. There are laws which regard the conduct of independent political societies in their various relations to one another; or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the Law of Nations, or International Law*. Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term, &c.’ (Austin, p. 187.)

Lord Mackenzie says,—‘Public International Law, according to Grotius, derives its authority from the common consent of nations, or

ments are laws binding British subjects, we must know to which of them the British Government has given its express or implied assent. These customs and agreements, with the rights and obligations they create, necessarily constitute the *matter* of International Law.

**The Matter** of International Law is said by Dr. Wheaton to comprehend—

1. The absolute International rights of States, embracing (a) Rights of self-preservation and independence; (b) Rights of civil and criminal legislation; (c) Rights of equality; (d) Rights of property.

2. International rights of States in their pacific relations; embracing (a) Rights of legation; (b) Rights of negotiation and treaties.

3. International rights of States in their hostile relations; embracing (a) The commencement of war and its immediate effects; (b) Rights of war as between enemies; (c) Rights of war as to neutrals; (d) Treaties of peace.

**Administration.**—‘The true foundation,’ says Dr. Story, ‘on which the administration of International Law must rest, is, that the rules which are to govern

at least, of a considerable number of them. Yet it may fairly be questioned whether the law by which nations profess to be governed in their mutual relations, can be treated as a positive law of human institution, or regarded as law otherwise than in a figurative sense, because it is deficient in those sanctions which are inseparable from the positive law of every distinct state. First, independent states acknowledge no human superior invested with cosmopolitan authority to make positive laws between nation and nation as such; and as no nation can legislate for another, so no given number of nations has power to make laws to bind the rest, at least with respect to things left indifferent by the law of nature. Next, as there is no accepted tribunal to settle disputes between nations, *the rules of International Law are not judicially administered*, and there is no supreme executive authority to enforce them.’ (Studies in Roman Law, p. 58.)

are those which arise from *mutual interest* and *utility*; from a sense of the inconveniences which would result from a contrary doctrine; and from a sort of moral necessity to do justice, in order that justice may be done to us in return.<sup>1</sup>

The foundation thus assigned to International Law is identical with that demanded by Municipal Law,—*mutual interest* or *utility*. Nor is it easy to determine wherein the mutual interests of men, regarded as members of the great human family, differ from the interests of the same men, when considered as members of individual nationalities.

**Definition.**—International Law—*jus inter gentes*—has accordingly been defined to be ‘those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent,’<sup>2</sup> or ‘those rules which define the rights and prescribe the duties of independent States in their intercourse with each other.’<sup>3</sup>

Grotius, who may be styled the founder of the science of *modern International Law*,<sup>4</sup> distinguishes the *Law of*

<sup>1</sup> Conflict of Laws, § 35.

<sup>2</sup> Wheaton's Elements of International Law, by Lawrence, 2nd ed. p. 26.

<sup>3</sup> Kent's Com., vol. i. p. 1.

<sup>4</sup> A protest should here be entered against the habit of denying to antiquity, and in particular to the Romans, all acquaintance with the principles of International Law. That many of the modern principles of that science were foreign to them, is of course too obvious to admit of doubt. The civilized world of their date differed widely from that of our own times, but so does that of to-day from that of the last century. It is true that the Romans have not transmitted to us any special treatise upon the subject; but it is equally so that we are no better favoured in the matter of Constitutional Law or the Law of Evidence. No one, however, upon that ground attempts to deny their acquaintance

*Nations from Natural Law* He says,—‘As the laws of each particular State are designed to promote its advantage, the consent of all, or at least the greater number of States, may have produced certain laws between them; and, in fact, it appears that such laws have been established, tending to promote the utility, not of any particular State, but of the great body of these communities. This is what is termed the *Law of Nations*, whence it is distinguished from *Natural Law*.<sup>1</sup> With Grotius’s definition of Natural Law before me (see page 14), I confess inability and unwillingness to recognise such a distinction. Unwillingness, because the necessary effect of such a distinction is to sap the very foundation of the science—to assert that, while God the author of nature has enjoined some actions, and forbidden others to men as members of a given State, yet that He has omitted to do so to men as members of the great human family. Mutual interest or utility cannot be any less the source of International than it is of Municipal Law.

with those two branches of law. That fact, therefore, cannot be received as an argument. It is said that the *jus gentium* of the Romans was not a body of rules regulating the mutual intercourse of nations, but that it was that portion of natural law to which all mankind does homage, and which has accordingly been incorporated into the domestic code of every nation. Referring to what has already been said about the Prætor Peregrinus, (pp. 96, 97,) we appear to be warranted in saying that the law administered by him should in strictness be styled the Private International Law of the Romans, which—as the number of residents in Rome to whom the Quiritarian Law was applicable became numerically less significant when contrasted with those to whom it was not applicable—ultimately supplanted the Quiritarian Law; the principles of the Private International Law being proved to be better adapted than those of the Quiritarian Law to the wants of the people generally. Without enlarging further upon this point, it appears only necessary to mention the fact, that every international jurist of eminence constantly refers to the Romans for authority. It would indeed be difficult to point to any fundamental principle that cannot be found in the works of Justinian.

<sup>1</sup> Grotius de Jur. Bel. ac Pac., Prolegom. 40, 17.

**The Sources** of International Law are :—

1. Necessity.
2. Custom.
3. Reason.<sup>1</sup>
4. Convention.

(a.) Treaties of peace, alliance, and commerce, declaring, modifying, or defining the pre-existing International Law.

(b.) Ordinances of particular States, prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

**Necessity.**—Of the Sources of International Law, I place *necessity* first, as being the natural basis—resulting from the innate springs of human action, on which it appears to me that all others must rest. It is not possible to imagine two contiguous nations, separated from each other merely by a river, a mountain range, or a forest belt, existing for ages, for years, or even for months, without intercourse of some character. When, forexample, the border-lords of England and Scotland, of England and Wales, carried on perpetual war, they were not prompted to fight by a passion for blood. Rivalry and aggrandisement, dearer to them than life, particularly that of their retainers, was the real incentive; for lightly as they esteemed human life, including their own, they held it sacred in the person of the captive lord, whose ransom was of greater value; in the person of the captive retainer, whose exchange furnished them with the tools for future raids. Can it be said even of these, that they had no International Law? If they had, of what did it consist other than those rude principles equally well known to the North American Indian—in short, to man,

<sup>1</sup> See *post*, Public International Law, p. 223.

wherever man is found? The respective characters of the neighbours, and the various motives for their intercourse, must necessarily determine the conditions of its existence; which conditions will be regulated by the circumstances of time, place, individual desire, and *mutual necessity*.

**Custom.**—Naturally flowing from necessity, is *custom*, *habit*. Custom (*Lat. consuetudo, Fr. coutume, It. costume, Sp. costumbre*) is defined to be ‘An unwritten law, established by long usage and the consent of our ancestors. If it is universal, it is *common law*; if particular, it is then properly *custom*. The requisites to make a particular custom good, are these:—1, It must have been used so long, that the memory of man runs not to the contrary; 2, it must have been continued, and 3, peaceable; 4, reasonable; 5, certain; 6, compulsory, and not left to the option of every person, whether he will use it or not; 7, consistent with other customs, for one custom cannot be set up in opposition to another.’<sup>1</sup>

This definition, though given to define the word *custom*, one branch of English Municipal Law, may be taken as accurate when applied to the *Jus Consuetudinarium* of nations, or the particular source of International Law under consideration, with such modifications only as the nature of the subject at once indicates.

Sir Travers Twiss says,—‘The *Jus Consuetudinarium* of nations is to be gathered from a variety of sources. Ancient collections of Maritime Usages, such as are to be found in the *Consolato del Mare* (13th century)<sup>2</sup> and the *Roles d’Oleron* (Richard I.), supply evidence of a very early practice. Thus the rule that enemy’s goods found

<sup>1</sup> Wharton’s Law Lexicon.

<sup>2</sup> See Hale, pp. 175, 176, notes.

on board of neutral vessels may be captured and condemned as prize of war, is supported by a long established practice, of which evidence has been recorded in the *Consolato del Mare*, c. 273. On the other hand, a *consuetudo* may be *inferred* from a succession of Public Treaties, in which exceptions to it have been made for temporary purposes, or in which regulations have been agreed upon as to the manner of enforcing it. Thus there are numerous instances of treaties since the middle of the seventeenth century, whereby nations bound themselves to make exception towards one another in regard to the practice of confiscating the goods of an enemy found on board of the vessel of a friend. Such exceptions, however, were matters of treaty-engagements; and when the treaty expired, the exceptional engagement ceased, and the general rule came into operation again. So likewise the *consuetudo*, under which the Sound Dues were levied by Denmark upon all vessels passing into or out of the Baltic by the narrow seas of the Sound or the Belts, was a matter of inference, as against the nations of Europe, from a series of treaties commencing in the fourteenth century, in which the European Powers have tacitly admitted the right of Denmark to levy tolls by negotiating for and agreeing to a tariff of the tolls. Again, a *consuetudo* may be directly recognized by the European Powers in a formal Convention; such, for instance, as the Convention of London, July 13, 1841, whereby the Five Principal Powers of Europe recognised the ancient rule of the Ottoman Porte to keep the passage of the Straits of the Dardanelles closed against foreign vessels of war whilst the Ottoman Porte is at peace, and declared their unanimous determination to conform them-

selves to it. Again, a *consuetudo* may be inferred from the Ordinances of Princes on matters touching their relations with other Powers, where an uniformity of principle is observed to pervade them, and their enactments in *pari materia* are identical.'

**Convention.**—The agreements entered into between two or more Sovereign Powers are termed *Treaties*.

'Treaties,' says Mr. Madison, 'may be considered under several relations to the Law of Nations, according to the several questions to be decided by them.'

'They may be considered as simply repeating or *affirming* the general law; they may be considered as *making exceptions* to the general law, which are to be a particular law between the parties themselves; they may be considered as *explanatory* of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, *first*, a law between the parties themselves; and *next*, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; *lastly*, treaties may be considered as a *voluntary or positive law* of nations.'<sup>2</sup>

**Ordinances.**—The Ordinances of particular States prescribe rules for the conduct of their own subjects; *e.g.*, their commissioned cruisers and prize-tribunals.

The marine ordinances of a State may be regarded, not only as historical evidences of its practice with regard to the rights of maritime war, but also as showing the views of its jurists with respect to the rules generally recognised as conformable to the universal Law of Nations. The Usage of Nations, which consti-

<sup>1</sup> Law of Nations—Peace, p. 124.

<sup>2</sup> Examination of the British Doctrine &c., p. 39.

tutes the Law of Nations, has not yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent State refers the jurisdiction over such cases to the Courts of Admiralty established under its own authority within its own territory, with a final resort to a supreme appellate tribunal, under the direct control of the executive government. The rule by which the Prize Courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties by which their own country is bound to other States. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers; or they may be furnished with a positive rule by their own sovereign, in the form of Ordinances, framed according to what their compilers understood to be the just principles of International Law.<sup>1</sup>

**Repositories.**—The repositories or sources of information as to what the existing International Law is, are—

1. The texts of existing Treaties and Ordinances.
2. Text writers of authority, showing what is the approved custom or usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.
3. The adjudications of International Tribunals, such as Boards of Arbitration, and Courts of Prize.
4. The written opinions of official jurists given confidentially to their own governments.

<sup>1</sup> Wheaton, p. 28.

5. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations.

**Branches.**—International Law, or the Law of Nations, is divided into two branches, Public International Law, and Private International Law, sometimes styled the Conflict of Laws.

**Public International Law** may be defined to be that body of rules founded upon general utility, and elaborated by reason, which has been accepted by the common consent of civilized nations as the rule of the mutual intercourse and conduct of sovereign powers, whether in their friendly or hostile relations.

Assuming *mutual interest* or *general utility* to be the basis upon which the superstructure, the science of International Law, is to be erected by a process of reasoning, we necessarily start from given definitions and postulates. Most of the requisite definitions we have already considered in the chapter on Jurisprudence. Sir H. S. Maine furnishes us with the following four postulates:—

**Postulates.**—1. There is a determinable Law of Nature.

2. That Natural Law is binding on States *inter se*.

3. If the society of nations is governed by Natural Law, the atoms which compose it must be absolutely equal.

4. Sovereignty is territorial; and Sovereigns *inter se* are to be deemed not *paramount*, but *absolute* owners of the State's territory.<sup>1</sup>

**Private International Law** is that department of private jurisprudence which determines before the

<sup>1</sup> Maine, *Ancient Law*, cap. iv.

courts of what nation each suit should be brought, and by the law of what nation it should be decided;<sup>1</sup> or, it is the collection of rules for determining the conflicts between the civil and criminal laws of different States: it is so called to distinguish it from *Public International Law*, which regulates the relations of States.<sup>2</sup>

It regulates private rights as dependent on a diversity of municipal laws and jurisdictions, applicable, or conceivably applicable, to the persons, facts, or things in dispute; wherefore it is also called *the Conflict of Laws*.<sup>3</sup>

**Maxims.**—Dr. Story gives, as the basis of Private International Law, the three following maxims:—

1. Every Nation possesses an exclusive sovereignty and jurisdiction within its own territory.

2. No State or Nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others.<sup>4</sup>

<sup>1</sup> Westlake's *Private International Law*, p. 1.

<sup>2</sup> Wheaton, p. 161.

<sup>3</sup> Westlake, p. 2.

<sup>4</sup> Upon this rule there is often engrafted an exception of some importance to be rightly understood. It is, that, although the laws of a nation have no direct binding force or effect, except upon persons within its own territory; yet that every nation has a right to bind its own subjects by its own laws in every other place. (Henry on Real and Personal Statutes, pt. i. ch. i. p. 1.) In one sense, this exception may be admitted to be correct, and well founded in the practice of nations; in another sense, it is incorrect, or at least it requires qualification. Every nation has hitherto assumed it as clear that it possesses the right to regulate and govern its own native-born subjects everywhere; and, consequently, that its laws extend to and bind such subjects at all times and in all places. This is commonly adduced as a consequence of what is called *natural allegiance*; that is, of allegiance to the government of the territory of a man's birth. Thus, Mr. Justice Blackstone says: "Natural allegiance is such as is due from all men born within the King's dominions, immediately upon their birth." "Natural allegiance is, therefore, a debt of gratitude which cannot be forfeited, cancelled, or altered by any change of time, place, or cir-

3. Whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.

It is, as we shall see hereafter, a fundamental principle that every nation possesses and exercises exclusive sovereignty and jurisdiction in its own territory. Hence the laws of every State affect and bind all property, moveable and immoveable, within its territory, and all persons resident within it, whether natural-born subjects or aliens. On the other hand, and for this very reason, no nation by its laws can directly bind or affect property beyond its own territory, nor can it affect persons not resident within it, whether they have been born within it or not. Cases frequently occur, however, where, by the *comity* of nations, one independent State does give effect to the laws and judicial acts of another, so far as this can be done without prejudice to its own laws, and to the fundamental and distinctive principles of its own internal policy. A familiar example of this is afforded by contracts entered into in a foreign country, and intended to be performed there, which our courts are in the practice of enforcing accord-

cumstance. An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. (1 Blac. Com. 369.) And he proceeds to distinguish it from *local* allegiance, which is such as is due from an alien or stranger born, for so long a time as he continues within the dominions of a foreign prince. The former is *universal* and *perpetual*; the latter ceases the instant the stranger transfers himself to another country, and it is therefore *local* and *transitory*. Vattel, on the other hand, seems to admit the right of allegiance not to be perpetual, even in natives; and *that* they have a right to expatriate themselves, and, under some circumstances, to dissolve their connection with the parent country. Story, Conflict of Laws, § 21. (Vattel, liv. i. ch. ix. p. 220, *et seq.*)

ing to the law of the place in which they were made, provided that law is not repugnant to our own institutions or to good morals.<sup>1</sup> This recognition and application of the laws of foreign nations to a particular case under adjudication in one of our own courts, is obviously prompted by a desire to deal *equity* to the several litigants. Consequently,

**The matter** of Private International Law belongs properly to a work on the Private Law of England, and should fall under the title "Alien." This chapter will be confined to the consideration of Public International Law.

**Subjects of International Law—Persons.**<sup>2</sup>—The persons with whom International Law is concerned may be enumerated as being—1. Sovereigns, with the ministers or representatives of sovereigns; viz., (a) Ambassadors, and papal legates or nuncios; (b) Envoys, ministers, or others accredited to sovereigns (*auprès des souverains*); (c) Ministers resident, accredited to sovereigns; (d) *Chargés d'affaires*, accredited to the Minister of Foreign Affairs. 2. Subjects. 3. Slaves. 4. Pirates.

**Sovereigns.**—To what has already been said in the chapter on Jurisprudence concerning sovereigns, we must here append a few additional remarks respecting sovereigns in their international character.

Wherever the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself,—

<sup>1</sup> Mackenzie, *Studies in Roman Law*, p. 57.

<sup>2</sup> The *subjects* of International Law are sovereign princes in their public or private capacity, and private persons, whether corporate or individual (Wheaton, p. 34); or, according to others, nations and those political societies of men called states.

"*l'État c'est moi.*" Hence the public jurists frequently use the terms Sovereign and State as synonymous. So also the term Sovereign is sometimes used in a metaphorical sense, merely to denote a State, whatever may be the form of its government.<sup>1</sup>

Sovereigns, as the subjects of International Law, possess, or may possess, two distinct characters. *First* and primarily, they are the *representatives* of the State of which they form an element. They are not the State, except in the case of absolute monarchies, nor have they, independently of the State, any International existence. *Secondly*, Sovereign princes may become the subjects of International Law, in respect to their personal right or rights of property, growing out of their personal relations with States foreign to those over whom they rule, or with the sovereigns or citizens of those foreign States. These relations give rise to that branch of the science which treats of the rights of sovereigns in this respect.<sup>2</sup>

As the existence of a Sovereign depends upon the existence of a State, and is co-terminous with that existence *plus* his recognised connection with it in that capacity by the other members of the State, we have to determine in what way an aggregate of human beings *becomes* and *ceases to be* a "State."

To the question—What constitutes a State (*nationalization*)? the answer is—Recognition.

**Nationalization.**—An aggregate of individuals is admitted into the fellowship of nations as a State, either *overtly*, by the recognition of its independence in some Public Act on the part of the Established

<sup>1</sup> Wheaton, International Law, p. 35.

<sup>2</sup> *Ib.* p. 34.

Powers, or *tacitly*, by being allowed to be a contracting party to a Public Convention entered into with the Established Powers.<sup>1</sup>

**Denationalization.**—The denationalization of a State or political body ensues upon its ceasing to have the capacity to enter into engagements freely with other nations, whether as the result of voluntary renunciation, or of its having been denuded by a superior power.

The Sovereign, as representing the State, which must be regarded as an independent moral being, has rights of two classes :<sup>2</sup> *primitive* or *absolute* rights, *conditional* or *hypothetical* rights. The absolute rights are, the right of *Self-preservation*, involving *security*, *self-defence*, *intervention* or *interference*, *indemnity*, *coalition* ; the right of *Independence*, involving *constitutional* and *municipal legislation*, and *jurisdiction* within the territory ; the right of *Sovereign Property* ; the right of *Equality*, involving *recognition* and *legation*.

Relatively to foreign States, there are necessary natural rights, which each sovereign is entitled to demand and, so far as he is able, to enforce. Relatively to

<sup>1</sup> Twiss' Law of Nations—Peace, p. 9.

<sup>2</sup> Vattel divides these rights into two classes, *perfect* and *imperfect*. He says,—‘The *perfect right* is that which is accompanied by the right of compelling those who refuse to fulfil the corresponding obligation ; the *imperfect right* is unaccompanied by that right of compulsion. The *perfect obligation* is that which gives to the opposite party the right of compulsion ; the *imperfect* only gives him the right to ask. The right is always imperfect, when the corresponding obligation depends on the judgment of the party in whose breast it exists, for if in such a case we had a right to compel him, he would no longer enjoy the liberty of determining as to the conduct which he should pursue, in order to obey the dictates of his own conscience. Our obligation is always imperfect with respect to other people, so long as we possess the liberty of judging how we are to act, and we retain that liberty on all occasions on which we ought to be free.’ Droit des Gens, Préliminaires, § 17. English ed. 1797.

his own subjects, it is his duty to maintain them, and it is his right to exact from them the assistance and support necessitated thereby. It is equally his duty to abstain from interference with the proper exercise of these rights on the part of other sovereigns, and to exert every lawful effort to avoid or to avert the horrors of war.

It will become our business to discuss the limits of these several rights in detail hereafter, under the title "Rights." We may, however, here add that, as no *legal right* can exist without a corresponding *legal duty or obligation*, so every *natural right* must involve its *natural duty or obligation*.

The natural equality of sovereign States may, however, be modified by positive compacts, or by consent implied from constant usage, so as to entitle one State to superiority over another in respect to certain external objects, such as rank, titles, and other ceremonial distinctions.

‘**Royal Honours** (*honores regii, honneurs royaux, königliche Ehren*).—’ Thus the International Law of Europe has attributed to certain States what are called *royal honours*, which are actually enjoyed by every empire or kingdom in Europe. . . . These *royal honours* entitle the States by which they are possessed to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other States public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies.’<sup>1</sup> Vattel says,—‘ Si les traités, ou un usage constant, fondé sur un consentement tacite, ont marqué les rangs, il faut s’y conformer. Disputer à un

<sup>1</sup> Wheaton, International Law, p. 295.

prince le rang qui lui est acquis de cette manière, c'est lui faire injure, puisque c'est lui donner une marque de mépris, ou violer des engagements qui lui assurent un droit.<sup>1</sup>

The Sovereign has the right to be addressed, at home and abroad, according to his proper and accustomed title.

The President of a Republic, when he represents the Republic, is entitled, both at home and abroad, to the same rank and honours as a Sovereign.

International Law forbids a *libel* upon a State, for the same reason that Municipal Law forbids a libel upon an individual. Therefore, a sovereign may proceed against his libeller in the courts of the country of the libeller.

Insults offered to the flag, the emblem of the national life, are invasions of the right to honour and respect, for which satisfaction may be demanded, and reparation ought to be made.<sup>2</sup> A wrong done to the humblest British subject, an insult offered to the British flag flying on the slightest skiff, is, if unrepaired, a dishonour to the British nation.<sup>3</sup>

Maritime ceremonials, in time of peace, are either—1, Recognition of sovereignty; or 2, Marks of conventional courtesy or comity; these acts of comity, like all others, sometimes assuming, through the force of treaty or long usage, the character of positive law.

They are paid to ships of war; to ports, fortifications, harbours; to sovereigns, or the representatives of sovereigns; to independent states, monarchical or republican.

<sup>1</sup> Droit des Gens, liv. 2, c. 3, s. 40.

<sup>2</sup> Phillimore, Internat. Law, vol. ii. p. 46.

<sup>3</sup> Sir James Mackintosh, Speech on the Recognition of the Spanish American States, vol. iii. p. 468. Phillimore, vol. ii. p. 42.

‘They consist in striking the flag (*supparum et summi aplustri submissio*—*salut du pavillon*—*das Flaggenstreichen*); lowering top-sails and striking flag; lowering the sails (*velorum demissio*—*salut des voiles*—*das Segelstreichen, die Lösung*); firing a certain number of guns (*salut du canon*—*Lösung der Canonen*).

‘Maritime ceremonials can only be claimed as recognitions of sovereignty where the sea is subject to the sovereign who claims them, that is to say, within cannon-shot of the shore, and within those parts of the sea where she has jurisdiction.

‘According to usage, merchant vessels are obliged to salute a vessel of war, generally by cannon-shot, and also by lowering flag and sails; the salute by sails being the most usual. Ships of war of equal rank are not constrained by custom to salute at all: those of inferior ought to salute those of superior rank. A single ship of war salutes a fleet or squadron; and an auxiliary squadron salutes the principal fleet.’<sup>1</sup>

According to the regulations of the British Navy as to salutes, ‘all salutes from ships of war of other nations, either to Her Majesty’s forts or ships, are to be returned gun for gun.’

‘A British ship or vessel of war meeting at sea a foreign ship of war bearing the flag of a flag-officer, or the broad pendant of a commodore commanding a station or squadron, and superior in rank to the officer of the British ship or vessel, shall salute such foreign flag-officer or commodore with the number of guns to which a British officer of corresponding rank is entitled, upon being assured of receiving in return gun for gun; and in the event of the British ship meeting with such

<sup>1</sup> Phillimore, *Internat. Law*, vol. ii. p. 47 *et seq.*

foreign flag-officer or commodore in a foreign port, similar complimentary salutes with such foreign flag-ship should be observed, if the regulations of the place shall admit thereof.<sup>1</sup>

**Precedence.**—Though the various Sovereigns known to International Law are, as we have seen, *equals*, nevertheless the rulers of certain countries have from time to time, owing to various circumstances, exercised greater influence over the affairs of nations than others, and as a consequence of such influence have had accorded to them distinguishing marks of respect. The influence thus acquired having been mainly due, except in the case of the Pope, to the extent of their dominions, the number, the wealth, and the warlike character of their subjects, the several rulers have assumed in their own countries distinctive *titles*, which more or less accurately convey the notion of the measure of their importance, and as a consequence give to the holder of each a corresponding rank ; for example, the Catholic Powers of Europe, recognizing in the Pope not merely the rights of a temporal Potentate governing an important and influential nation, but a class of spiritual domination over all Sovereigns adherents of the same faith, not unreasonably conceded to him the precedence of all others. Russia, however, and the Protestant States, regarding him merely as an ordinary Sovereign Prince, and refusing to recognise his spiritual character, with equal consistency declined to give to him the precedence, and it is to be presumed that in his present position it will be withheld even by the Catholic Powers. ‘The Emperor of Germany, under the former constitution of the Empire, was conceded precedence over all other temporal princes, as

<sup>1</sup> Regulations relating to salutes.

the supposed successor of Charlemagne<sup>1</sup> and of the Cæsars in the Empire of the West; but since the dissolution of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the Emperor of Austria, the precedence of this sovereign over other princes of the same rank may be considered questionable.<sup>2</sup>

The times and circumstances that gave rise to these distinctions having long since passed, as also, it is to be hoped, the petty jealousies which they occasioned, and as the use of so small a matter as a round table or a ballot-box would be sufficient to calm the apprehension of the most sensitive stickler for the position of his chair, I shall dismiss this topic by referring the curious reader to Dr. Wheaton's Elements, p. 296 *et seq.*, and the works there referred to.

The person of a Sovereign going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State, under the permission which, in time of peace, is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides.<sup>3</sup> His ambassador, or other public minister, his army or fleet, while marching through, sailing over, or stationed in, the territory of another State, with which he is in amity, are in like manner privileged.

<sup>1</sup> Charlemagne, Emperor from 800 to 814.

<sup>2</sup> Wheaton, International Law, p. 296; Marten, Précis du Droit des Gens—De la Préséance, § 130 *et seq.*; Klüber, Droit des Gens, Précédence, § 92 *et seq.*

<sup>3</sup> Wheaton, p. 188.

**Subjects.**—To what has been said in the chapter on Jurisprudence concerning subjects, we must here add a few additional remarks.

The consideration of the civil rights of the subject of any particular State pertains to the exposition of the Constitutional Law and the Municipal Law, *Public* and *Private*, of that State; the Municipal Private Law embracing what is known as Private International Law, the matter of which has already been stated (page 223).

We are concerned in this chapter with the subject regarded as a *fraction* of a sovereign State, and considered relatively to other sovereign States.

Under the term *subject* may be included both *native* and *naturalized* citizens.

The native citizens of a State are those born within its dominions, even including, according to the law of England, the children of alien friends.<sup>1</sup> So are all those born on board the ships of the *navy*, or within the lines of the *army*, or in the house of the ambassador, or of the sovereign if he should happen to be sojourning in a foreign country;<sup>1</sup> and all children born abroad, whose fathers or grandfathers, by the father's side, were natural-born subjects, are now deemed to be natural-born subjects themselves, unless the ancestors of such children at the time of their birth were attainted for treason, or were liable for the penalties of treason. If an alien woman marries a natural-born subject, or person naturalized, she becomes *ipso facto* naturalized.<sup>2</sup>

**Naturalization** is said to be a change of nationality. The naturalized person is supposed, for the purposes

<sup>1</sup> Phillimore, *Internat. Law*, vol. i. p. 376.

<sup>2</sup> See *Steph. Com.* vol. ii. p. 413 *et seq.*; 7 and 8 Vic. c. 66, s. 3—16.

of protection and allegiance at least, to be incorporated with the naturalizing country.

This proposition is, generally speaking, sound ; but it must be taken subject to this qualification :—If the naturalized person should have been the subject of a country which does not allow its subjects to shake off their allegiance (*exuere patriam*) at will, he having done so, or more correctly having attempted to do so, would be treated as a *rebel*, and not as a *lawful enemy*, should he be taken by his native country in arms against it.<sup>1</sup>

As allegiance to the sovereign power of his native country exists from the birth of the individual, and continues till a change of nationality, we have to enquire how such a change can be effected.

By the 7th and 8th Vic. c. 66, s. 8, naturalization is conferred by the certificate of one of the Secretaries of State, and the oath of allegiance taken thereupon. The granting of this certificate is discretionary, and it must except the capacity of becoming a member of the Privy Council or of either House of Parliament, and may except any other rights and capacities belonging to a British subject.

By 33 Vic. c. 14, s. 7, it is further enacted :—‘ An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of Her Majesty’s Principal Secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom or to serve under the Crown, may apply to one of Her

<sup>1</sup> Phillimore, *Internat. Law*, vol. i. p. 380.

Majesty's Principal Secretaries of State for a certificate of naturalization.

'The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision ; but such certificate shall not take effect until the applicant has taken the oath of allegiance.

'An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom ; with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

'The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission

that the person to whom it was granted was not previously a British subject.

‘An alien who has been naturalized previously to the passing of this Act, may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien, upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.’

And by sec. 3 :—‘Where Her Majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it shall be lawful for Her Majesty, by Order in Council, to declare that such convention has been entered into by Her Majesty; and from and after the date of such Order in Council, any person, being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the State to which he originally belonged as aforesaid.

‘A declaration of alienage may be made as follows; that is to say,—If the declarant be in the United Kingdom, in the presence of any justice of the peace; if elsewhere in Her Majesty’s dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for

the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.'

As naturalization involves the acquisition of a new national character, it ought to be accompanied with the loss of the old. In principle, no one should be a citizen of two nations at the same time, because, in the event of a war arising between them, he would be involved in conflicting duties by a divided allegiance. Yet, with singular inconsistency, some of the States which readily admit foreigners as citizens, strenuously insist on the perpetual allegiance of their own subjects. This was conspicuously the case with England prior to the 12th of May, 1870, where, as in America, allegiance was regarded as a perpetual obligation, one that could not be dissolved without the mutual consent of sovereign and subject. The 33 Vic. c. 14, however, provides, sec. 4, that 'Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.'

Sec. 6. 'Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien ; Provided,—

'(1.) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign State and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject ; with this qualification, that he shall not, when within the limits of the foreign State in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect :

'(2.) A declaration of British nationality may be made, and the oath of allegiance be taken.'<sup>1</sup>

Sec. 8. 'A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a *statutory alien*, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of Her Majesty's

<sup>1</sup> See page 237.

Principal Secretaries of State for a certificate hereinafter referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said Secretary of State shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

‘A *statutory alien* to whom a certificate of re-admission to British nationality has been granted shall, from the date of the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject ; with this qualification, that within the limits of the foreign State of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject of that foreign State according to the laws thereof, or in pursuance of a treaty to that effect.

‘The jurisdiction by this Act conferred on the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession ; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the United Kingdom.’

The French Civil Code, sec. 17, enacts that ‘The quality of Frenchman shall be lost—1, by naturalization in a foreign country ; 2, by accepting, without the authority of government, public employments bestowed by a foreign power ; 3, by adoption into any foreign corporation which shall require distinction of birth ; 4, in short, by any settlement made in a foreign country, without

intention of return.' Similar regulations exist in other Continental States.

**Domiciled Inhabitants.**—In addition to citizens native or naturalized, is to be found a class, daily growing more numerous, of persons who have left their native land *sine animo revertendi*, and taken up their abode in a foreign country. Such persons, though not *de jure*, are *de facto* citizens of the land of their adoption, and their rights are determined by the Municipal Law of that land. They are commonly debarred all participation in political privileges: their purely *civil* rights are also, in various respects, inferior to those of native or naturalized subjects; *e. g.*, in England, Dr. Stephen says, 'Aliens are incapable of taking by descent, or inheriting, for they are not allowed to have any inheritable blood in them. . . . Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.'<sup>1</sup>

They are also prohibited from owning, either in whole or in part, any British vessel, except under *peculiar* circumstances; see the Merchant Shipping Act, 17 & 18 Vic. c. 104 (1854), sec. 18, clause (3).

By 33 Vic. c. 14, s. 2, it is however enacted:—'Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided,—

<sup>1</sup> Steph. Com., vol. i. p. 442.

‘(1.) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise :

‘(2.) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him :

‘(3.) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.’

The same Act however declares, sec. 14, that ‘nothing in this Act contained shall qualify an alien to be the owner of a British ship.’

**Slaves.**—The law of England so abhors slavery, that it will not endure its existence even in a qualified form in this land. ‘So when an attempt was made to introduce it by statute, 1 Edward VI., c. 3, which ordained that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed within two years. And in modern times, it has been laid down that a negro or other slave, the instant he lands in England, becomes a free man; that is, the

law will protect him in the enjoyment of his person and his property.’<sup>1</sup>

With that inconsistency which too frequently characterizes the acts of men when pecuniary interests are involved, trading in slaves, and their subjection to all the rigours of their hard lot within our colonies, was till a comparatively recent date held to be legal.

According to Sir W. Scott,<sup>2</sup> ‘trading in slaves was neither piracy, nor legally criminal. It was sanctioned by ancient admitted practice, by the formal transactions of civilized states, and by the doctrine of the Courts of the Law of Nations.’ He might have added, and openly justified in Christian pulpits.

By the 3rd and 4th William IV., c. 73 (1833), slavery was abolished in the British Colonies, and as an expiation for our sin against nature, England paid £20,000,000 by way of compensation to the slave-owners for their deprivation of a species of property which they ought never to have been suffered to acquire.

In 1865, the *status* of slavery was also formally abolished in the United States, under circumstances which render it questionable whether it was an act of justice or humanity to the slave, however necessary, and as such justifiable, it may have been as a belligerent stratagem.

Sir Robert Phillimore says,—‘International Law has for some time forbidden the captive of war to be sold into slavery. Of late years, it has made a further step; it now holds that the colour of the man does not affect the application of the principle. The black man is no more capable of being a chattel than the white man. The negro and the European have equal rights; neither

<sup>1</sup> Steph. Com., vol. ii. p. 242.

<sup>2</sup> The *Le Louis*; 2 Dodson’s A. R., p. 260. A.D. 1817.

is among the "*res positæ in commercio*," in which it is lawful for States or individuals to traffic.<sup>1</sup>

I am therefore justified in placing *slaves*, when creating of the existing International Law, under the title "*persons*;" the word "*slave*" designating a subject deprived of his natural and civil rights, contrary to the Law of Nations, by the hand of an oppressor, from whose power it is the duty of civilized nations to rescue him whenever that can be done without the infraction of any other equally sacred obligation.

A catalogue of the treaties entered into between Great Britain and other powers between the years 1814 and 1862, their object being to abolish the nefarious traffic in human flesh, will be found in the first volume of Sir R. Phillimore's Commentaries upon International Law, pages 360, 361, concerning which, he says, 'To be cognizant of the treaties entered into between Great Britain and other States, is to be apprised of all that has been concluded upon this subject; to know their contents, is to be acquainted with the international history of the abolition of the Slave Trade.'

**Pirates.**—Pirates may be defined to be those common enemies of mankind who infest the ocean-highway for the purposes of plunder.

**Piracy** is defined by Dr. Wheaton to be 'the offence of depredating on the seas, without being authorized by any Sovereign State, or with commissions from different Sovereigns at war with each other.'<sup>2</sup> Pirates are the common enemies of all mankind, and may be lawfully captured on the high seas by the armed vessels of any State, and taken within its territorial jurisdiction

<sup>1</sup> Phillimore, Internat. Law, vol. i. p. 342.

<sup>2</sup> International Law, p. 246.

for trial in its tribunals ; but this proposition must not be extended to offences which are made piracy by the municipal legislation of any country or countries merely, and not as defined by the Law of Nations.

Sir W. Scott<sup>1</sup> says,—‘ To make anything piracy or a crime by the universal Law of Nations, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a General Convention.’<sup>2</sup>

**Relation.**—Having defined the different classes of persons, and commented upon their various attributes, we have now to consider the several relations in which they may stand to each other, and the incidents of each position.

1. In time of peace, all Sovereigns are regarded by International Law as *friends and independent equals*, entitled to all the privileges of sovereignty.

2. In the event of a war between any two or more States, each Sovereign, together with his subjects, becomes, as it were, one individual, a unit ; which collected units are divisible into three classes, viz., *Allies, Foes, and Neutrals*. It is with men, sovereign and subject, and the various rights and obligations attaching to each character, as friend and independent equal, as foe, as ally, and as neutral, that the jurist is concerned when considering the *objects* of International Law.

**The Objects of International Law—Rights.**—The *objects* of International Law are *Rights*,<sup>3</sup> with their

<sup>1</sup> Afterwards (1820) Lord Stowell.

<sup>2</sup> The *Diana*, 1 Dodson's Adm. Rep., p. 95.

<sup>3</sup> Totum autem jus consistit aut in acquirendo, aut in conservando, aut in minuendo ; aut enim hoc agitur, quemadmodum quid cujusque fiat, aut quemadmodum quis rem vel jus suum conservet : aut quomodo alienet aut amittat. (Dig. 1, 3, 41.)

corresponding *obligations*. As the agreements entered into between Sovereigns produce, as has been already explained (p. 213), distinct and different *effects*, determinable as we regard the *sovereign* parties to the agreement, or the *subjects* of those Sovereigns, it necessarily follows that the rights and obligations resulting from such agreements are of two classes; viz., *first*, those accruing to the Sovereigns, and *secondly*, those accruing to their subjects. As to the first, it is clear that, as the agreements are agreements of parties who are not subject to any superior, they are not *laws*, in the proper sense of the term; and consequently the rights springing from them are not *legal rights*, nor are the corresponding obligations *legal obligations*. Therefore these rights, which we may style *natural rights*, cannot, properly speaking, be adjudicated upon.

On the other hand, the effect of the agreements entered into between the Sovereigns being to impose *positive laws* upon their respective subjects, the right, with its corresponding obligation springing to the subject, is a *legal right*, and a *legal obligation*, which can be adjudicated upon by the proper tribunal of each Sovereign, and which consequently can be enforced either in favour of, or against, the subject.

Every agreement, therefore, entered into between independent Sovereigns, creates two classes of rights, *natural rights* and *legal rights*.

We have thus established one class of *natural rights*, those arising from the convention of Sovereigns, which it will be convenient to designate *Conventional Natural Rights*.

Independently, however, of convention, every Sove-

reign, by virtue of his *sovereignty*, has several other *natural rights*, which we will distinguish from the former by the term *Sovereign Rights*.

These *Sovereign Rights*, like the *Conventional Natural Rights*, when withheld or refused, can only be asserted by *force*.

To understand what these Sovereign rights are, as regarded by the International jurist, we must realize the answer to the question, What is a Sovereign? This question is best answered by the enumeration of the postulates:—1. There is a determinable Law of Nature. 2. Natural law is binding upon States *inter se*. 3. If the society of nations is governed by Natural Law, the atoms which compose it must be absolutely equal; and—4. Sovereignty is territorial; and Sovereigns *inter se* are to be deemed, not *paramount*, but *absolute* owners of the State's territory.

As these four postulates appear to be resolvable into two propositions, viz., (1) That International Law regards each Sovereign, together with his people and territory, as one thing, as a *unit*; (2) That these units are governed solely by the Law of Nature; the whole matter may be brought forcibly before the mind by a simple illustration. Imagine, then, two vessels before you upon the broad ocean. The captain of each is its sovereign, the crew his subjects, the ship his territory. He has no superior but the Great Creator. Appealing simply to *common sense*, let us ask the question, What are the rights and duties of each?

**Division of Rights.**—The fact of there being two Sovereigns, each having *subjects* and *territory* distinct from those of the other, indicates that there must be two primary and distinct classes of *rights* which may

be distinguished by the terms ORIGINAL SOVEREIGN RIGHTS and DERIVATIVE SOVEREIGN RIGHTS. *Original Sovereign Rights* are rights that are proper to each as independent of the other—a class of rights which each would, in fact, possess were not the other even in existence. These rights are therefore incident to the mere fact of existence. They may in the first instance be summarised as the right ‘*to be*,’ the right ‘*to have*,’ and the right ‘*to do*.’ The right ‘*to be*’ imports the right to remain as one is, *i.e.*, to remain *unmolested*, to be independent or free; and as being independent, unmolested, and free is the condition of equals, the first or principal *absolute sovereign right* may be said to be *Independence*.

The fact of being, or the right ‘*to be*,’ necessarily carries with it the right ‘*to have*.’ The things which the Sovereign can have in addition to his *being*, and the incidents of being, may be reduced to two, *viz.*, *subjects* and *property*. The fact of his having *subjects* imports the right *to govern* them, to legislate for them, or, in other words, to determine the rule of their conduct. His remaining possessory object is *property*, by which term we understand, when using it as a Sovereign attribute, *the full, the unqualified, and unrestrained right* to put the subject of property to any and every use it is by its nature capable of being put to. Such property is of two classes,—(1), *immoveable*, or, as it is commonly termed, *real property*, and (2), *moveable* or *personal property*. The real property of the Sovereign is styled his *territory*. As in the case of the *person*, his subject, he has the right to legislate, *à fortiori* must he have the same right in regard to his property; and be it remembered that the absolute ownership of everything within

his sovereignty is in the Sovereign, the *interest* in individual things enjoyed by particular persons being such merely as the Sovereign permits, which though practically absolute, is subject to all Sovereign necessities.

The place then where the Sovereign has subjects and property, is his *territory*, and within this he has the power to determine the rights of both, or, in other words, he has *jurisdiction*. His territory and jurisdiction are consequently coterminous. The second absolute Sovereign right may, therefore, be termed *Jurisdiction*.

Flowing from the right '*to be*' and the right '*to have*' is the right '*to do*' any and everything necessary to preserve the two former intact. This right may therefore be appropriately styled the right of *Self-preservation*.

I have been prompted to make this new classification, first, because no one classification has been uniformly adopted; and, secondly, because each of the classifications with which I am acquainted appears to be susceptible of simplification.

**Original Sovereign Rights**—or Absolute Sovereign Rights—may therefore be stated as being:—1, Independence, involving non-interference and equality; 2, Jurisdiction, embracing dominion and legislation; and 3, Self-preservation.

**Independence.**—Every State that does not *de jure* depend upon any other State for its freedom of political action is entitled to be regarded as independent. The continuance of its existence as an independent State must depend upon either its own power of main-

tenance, or the support of others to whose interests its existence is material.<sup>1</sup>

To be independent, is to be upon an equality with all others in respect to the rights of *self-support* and *self-control*; it therefore imports perfect freedom from interference as to the relationship existing between the various members of the State, and the methods adopted to determine that relationship; for example, no one or more States has the right to dictate to another whether it shall be a *monarchy* or a *democracy*. Independence carries with it the right to take all measures calculated, or supposed to be calculated, to render that independence secure. If, then, one independent State finds itself the neighbour of another, whose attitude threatens its independence, the Sovereign power has not merely the right, but is bound, as a duty to the subject portion of the State, to fortify itself against all possible attack, in order not merely that it may make its independence secure, but that security may be enjoyed in peace. And, as independence is the consequence of '*being*,' it carries with it the natural incidents of *being*, — *growth* and *development*. It is, therefore, the right of every State to improve its condition, so far as it is capable of being improved, without recourse being had to expedients antagonistic to the rights of other States; at least, so far as International Law is concerned, with the interests of those States which have entered the fraternity of nations who have bound themselves to be governed by the Law of Nations.

Lord Bacon says, — 'First, therefore, let nations that

<sup>1</sup> 'Necessarium itaque est ad securitatem, quam quærimus obtinendum, ut numerus eorum qui in mutuum opem conspirant, tantus sit ut paucorum hominum ad hostes accessio non sit ipsis conspicui momenti ad victoriam.' (Hobbes, *De Cive*, c. 5, § 3.)

pretend to greatness have this, that they be sensible of wrongs, either upon borderers, merchants, or politick ministers; and that they sit not too long upon a provocation; secondly, let them be prest (prompt) and ready to give aids and succours to their confederates; as it ever was with the Romans: insomuch, as if the confederate had leagues defensive with divers other States, and, upon invasion offered, did implore their aids severally, yet the Romans would ever be the foremost, and leave it to none other to have the honour. As for the wars, which were anciently made on the behalf of a kind of party, or tacit conformity of estate, I do not see how they may be well justified: as when the Romans made a war for the liberty of Græcia, or when the Lacedæmonians and Athenians made wars to set up or pull down democracies and oligarchies: or when wars were made by foreigners, under the pretence of justice or protection, to deliver the subjects of others from tyranny and oppression, and the like. Let it suffice, that no Estate expect to be great that is not awake upon any just occasion of arming.<sup>1</sup>

Every right has its limits: it is limited by the analogous rights of every member of the same society.<sup>2</sup>

No country has, then, the right to set itself up as the *custos morum* of another. No country has the right to send the advocate of its political, religious, or social tenets to propagandize within the territory of a State whose institutions are at variance with those tenets, except with the express permission of its rulers.

And in no case, in which a nation has the right of

<sup>1</sup> 'Bacon's Essays,' "Greatness of Kingdom."

<sup>2</sup> 'Chaque droit a ses limites: il est limité par les droits analogues de tous les membres d'une société.' (Ahrens, Cours de Droit naturel ou de Philosophie du Droit, p. 296.)

judging what its duty requires, has any other nation the right to compel it to act in this or that particular manner; for any attempt at such compulsion would be an encroachment on the independence of that nation.

‘No one nation,’ says Sir W. Scott,<sup>1</sup> ‘has a right to force its way to the liberation of a particular people, *e.g.* the Africans, by trampling on the independence of other States; or to procure an eminent good by means that are unlawful; or to press forward to a great principle by breaking through other great principles that stand in the way.’ The independence of a nation is absolute, and not subject to qualification, so that nations, in respect of their intercourse under the Common Law, are *Peers* or *Equals*; and their rights and obligations are, under that law, reciprocal. Power and weakness do not, in this respect, give rise to any distinction, and a Free City of Germany is as much an independent State as the Empire of the Ottomans. It results from this equality, that whatever is lawful for one nation is equally lawful for another, and whatever is unjustifiable in the one is equally unjustifiable in the other.<sup>2</sup> It is, therefore, the duty of each Sovereign to restrain his subjects from invading the territory or other rights of other Sovereigns. ‘That this duty of restraining her subjects is incumbent upon a State, and that her inability to execute it cannot be alleged as a valid excuse or as a sufficient defence to the invaded State, are propositions which, strenuously contested as they were in 1818, will scarcely be controverted in 1870.’<sup>3</sup>

<sup>1</sup> *The Diana*, Dodson’s Admiralty Reports, vol. ii. p. 210.

<sup>2</sup> Twiss, *Law of Nations—Peace*, p. 11.

<sup>3</sup> Phillimore, *Internat. Law*, vol. i. p. 464.

‘It is a consequence,’ says Lord Mackenzie, ‘of the liberty and independence of nations, that all have a right to be governed as they think proper. That no State, unless authorised by treaty stipulations, is entitled to interfere in the internal concerns of another, is a general rule of the Law of Nations; but in practice it has been departed from in some extreme cases. Questions of disputed succession to a throne have always been deemed matters which might justly be considered as involving the political interests of foreign States; and in such questions, whenever arising, the powers of Europe have, from time to time, according as *their interests impelled them*, held themselves at liberty to take an active part. To oppose the union of the two Crowns of France and Spain on the same head, in 1700, was considered essential for the security of the other European States. So, by the quadruple treaty in 1834, Britain and France united with Spain and Portugal in expelling from the Peninsula the two Infantes, Don Carlos and Don Miguel.’<sup>1</sup>

**Jurisdiction.**—Confining the mind for the moment to the illustration we have employed, and shall continue to use, in the elucidation of International principles—the ship—we at once seize the extent of the Sovereign’s (captain’s) jurisdiction. It extends to his entire vessel, and all within it; and in whatever part of the mighty deep the vessel may chance to ride, it embraces that spot, with the surrounding area sufficient to render it available and secure. So long, therefore, as the one vessel keeps at a *reasonable* distance from the other, the rights as to jurisdiction and territory are not infringed. What then is a *reasonable* distance? The

<sup>1</sup> Studies in Roman Law, p. 59. See “Intervention,” post.

answer to this question involves the discussion of the international doctrine of territory, its extent and limits; and as the territory of the Sovereign of an island, *e.g.* of Great Britain, approximates the most closely to our illustration, we will consider that first.

**Territory—*An Island Sovereignty.***—The territory of the Sovereign of an island obviously embraces the whole island, including ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands, portions of the island; to this the general usage of nations superadds a certain distance from the shore, along all the *coast* of the State.<sup>1</sup>

**Coast.**—The term “Coast” includes the natural appendages of the territory which rise out of the water, although these islands may not be of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water.

The rule of law upon this subject is, *Terræ dominium finitur ubi finitur armorum vis*; and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from the shore.<sup>2</sup>

With these three miles the territory, and consequently the territorial jurisdiction, of the island Sovereign ends. His rights as to the sea beyond are rights in common with those of all mankind. It is scarcely necessary to say that, should an island emerge within the three miles, it would form part of the territory, or that, whether such island is composed of earth or solid rock, will not vary the right of dominion; for ‘the right of dominion does not depend upon the *texture* of the soil.’<sup>3</sup>

<sup>1</sup> Wheaton, *International Law*, p. 320.

<sup>2</sup> *Ib.*, p. 321.

<sup>3</sup> Sir W. Scott, *The Anna*, 5 Rob. A. R., p. 373.

The sea<sup>1</sup> cannot become the exclusive property of any nation; because

1. Those things which are originally the common property of all mankind, can only become the exclusive property of a particular individual or society of men by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

2. In the second place, the sea, like the air, is an element which belongs equally to all men. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.<sup>2</sup>

The right of fishing, however, in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State.<sup>3</sup>

**Mainland Territory.**—The remaining classes of territorial sovereignty are two: 1, A territory in part bounded by the sea; and 2, A territory having no sea border. The first, so far as its coast line extends, has already been defined; for, to that extent, its limits are identical with those of an island. The coast line excepted, the remaining features of these two classes are the same; therefore, as affecting the two, we may observe that the territorial limits of contiguous sovereignties are in all cases fixed by the common consent of the respective Sovereigns. The expression '*common consent*' must not, however, be taken to import *willingness*; the line of demarcation in this, as in most matters

<sup>1</sup> Grotius says that Sovereignty may be acquired over a portion of the sea, '*ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat.*' (De Jur. Bel. ac Pac. lib. 2, c. 3, § 13.)

<sup>2</sup> Wheaton, p. 341.

<sup>3</sup> Ib., p. 323.

of a like nature, being drawn by the stronger, and accepted as conclusive by the weaker.

The River and the Mountain are not necessary landmarks.

When, however, a navigable river forms the boundary of conterminous States, *the middle of the channel* is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both.

The jurisdiction possessed by one nation over sounds, straits, arms of the sea, or rivers leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of *innocent passage* through these communications. This right of innocent passage is termed an *imperfect right*, its exercise being necessarily modified by the safety and convenience of the State or States affected by it, which can only be effectually secured by mutual conventions regulating the mode of its exercise.<sup>1</sup>

Proceeding upon the principle that the river itself was *communis usus*, but that the bed of it was so much land belonging to the proprietors of the banks, though the property was in abeyance while covered with water, and that the mid-channel was the line of demarcation between the neighbours, the Romans held—<sup>2</sup>

1. That if an island emerged in the stream, the property of it accrued to the owner of the nearest bank.

2. If it emerged in the middle of the stream, the property was divided equally between the *arcifinii*, as the opposite proprietors were called.

<sup>1</sup> Wheaton's International Law, p. 346.

<sup>2</sup> See Phil. Int. Law, i. 282; and Dig. and Inst., titles, '*De Fluminibus*,' '*De Rerum divis.*,' '*De Alluvionibus*,' '*De Adquir. rerum dom.*'

3. If the channel of the river was left dry (*alveus derelictus*), it was also equally apportioned between the *arcifinii*.

4. In the case where the river abandoned its new channel, however, a difference of opinion existed whether that channel also accrued in equal moieties to the owners of the banks, or whether it reverted to the dominion of the ancient proprietor (*cujus antea fuit*). Caius entertained the former, Pomponius the latter opinion. Both appear in the "Digest," the former only in the "Institutes."

5. All alluvial deposits belonged to the owner of the bank to which they adhered.

6. If the violence of the stream (*vis fluminis*) had detached a portion of the soil from one bank and carried it over to the other side, if it became firmly embedded so as to be irremovable, it belonged to the owner of that side, otherwise it might be vindicated by its old proprietor.

These principles, being held to be sound, have been generally adopted where the Roman law is studied.

**Extension of Territory.**—We have said that one of the rights of sovereignty is *development*. In what way, then, can the sovereign develop and enlarge his territory? To avoid confusion, we may express the territory already described by the term *original territory*; that to which we are about to direct attention, by the term *new territory*.

The three modes of acquisition of territory specified by Grotius<sup>1</sup> are :—

1. By Occupation (*occupatione derelicti*).
2. By Treaty and Convention (*pactionibus*).
3. By Conquest (*victoriæ jure*).

<sup>1</sup> See Phillimore, *Internat. Law*, vol. i. p. 268.

The three bases, says Wheaton, of property right required by the general law of nations and immemorial usage, are—1, the title of first discovery; 2, the title of first occupation; 3, the title which results from a peaceable and continued possession for a reasonable time.<sup>1</sup>

According to the acknowledged practice of nations, *discovery* furnishes an *inchoate* title to *possession* in the discoverer.

The discoverer must, however, either in the first instance be fortified by the public authority of the State of which he is a member, or his discovery must be subsequently adopted by that State; otherwise the discovery does not fall under the cognizance of International Law, except perhaps in a limited degree; that is to say, the *individual* has a *natural* title to be undisturbed in the possession of the territory which he occupies. It is a question pertaining to the Municipal Law of his own country, whether such possessions do not belong to her, and whether he must not hold them under her authority and by her permission. Such would be the case in the event of discovery of territory by an English subject.<sup>2</sup> As Public International Law only deals with *sovereign* rights, and as the *absolute ownership of territory* is a sovereign right, the mere discovery and occupation of a given territory by the subject of any sovereign power when not acting as the representative of that power, cannot, it is to be presumed, be taken cognizance of by any sovereign power making a subsequent discovery and occupation of the same territory.

<sup>1</sup> Internat. Law, p. 308.

<sup>2</sup> Phillimore, Internat. Law, vol. i. p. 269.

**Occupation.**<sup>1</sup>—‘All corporeal property depends very much upon occupancy. With respect to the origin of property, this is the sole foundation; *quod nullius est ratione naturali occupanti conceditur*. So with regard to *transfer*, it is universally held, in all systems of jurisprudence, that to consummate the right of property, a person must unite *the right of the thing with possession*. . . . All concur in holding it to be a necessary principle of jurisprudence, that, to complete the right to property, *the right to the thing and the possession of the thing itself* should be united; there should be both the *jus in rem* and the *jus in re*. This is the general rule of property, and applies, I conceive, no less to the right of territory than to other rights.’<sup>2</sup>

‘The exclusive right,’ says Wheaton, ‘of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States.’<sup>3</sup>

‘This exclusive right includes the public property or domain of the State, and those things belonging to

<sup>1</sup> Tous les hommes ont un droit égal aux choses qui ne sont point encore tombées dans la propriété de quelqu'un; et ces choses-là appartiennent au premier occupant. Lors donc qu'une Nation trouve un pays inhabité et sans maître, elle peut légitimement s'en emparer; et après qu'elle a suffisamment marqué sa volonté à cet égard, un autre ne peut l'en dépouiller. C'est ainsi que les navigateurs, allant à la découverte, munis d'une commission de leur souverain, et rencontrant des îles, ou d'autres terres désertes, en ont pris possession au nom de leur Nation: et communément ce titre a été respecté, pourvu qu'une possession réelle l'ait suivi de près. (Vattel, liv. i. c. 18, § 207.)

<sup>2</sup> Sir W. Scott, *The Fama*, 5 Rob. A. R., 114 et seq.

<sup>3</sup> Internat. Law, p. 303.

private individuals, or bodies corporate, within its territorial limits.<sup>1</sup>

The domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights (*droits*) it enjoys.<sup>2</sup>

**Eminent Domain.**—‘The national proprietary right, in respect of those things belonging to private individuals, or bodies corporate, within its territorial limits, is *absolute* so far as it excludes that of all other nations; but, in respect to the members of the State, it is *paramount* only, and forms what is called the *eminent domain*; that is, the right, in case of necessity, or for the public safety, of disposing of all the property of every kind within the limits of the State. . . . Uninterrupted possession of territory, or other property, for a certain length of time by one State excludes the claim of every other; in the same manner as, by the law of nature and by the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question.’<sup>3</sup>

What facts constitute an occupation? What are the signs and emblems of its having taken place?

‘It is a clear principle of International Law, that the title may not be concealed, that the *intent* to occupy must be manifested by some *overt* or *external* acts.’

‘These acts, by the common consent of nations, must be *use of* and *settlement* in the discovered territory.’<sup>4</sup>

The mere erection of crosses, landmarks, and inscriptions is inefficient for acquiring or maintaining an exclusive title to a country of which no real use is made.<sup>5</sup>

<sup>1</sup> Wheaton, p. 303.    <sup>2</sup> Vattel, liv. 2, c. 7, § 80.    <sup>3</sup> Wheaton, p. 303.

<sup>4</sup> Phillimore, Internat. Law, vol. i., pp. 271, 272.

<sup>5</sup> See Klüber, ‘Continuation,’ § 126.

How much territory is occupied by such a settlement? What, in fact, is the International doctrine of *contiguity* (*ratio vicinitatis*)?

From the nature of the subject, no precise and comprehensive answer can be given. It may, however, be observed—

1. That occupation of any portion of an island, when not of continental proportions, is an occupation of the whole.

2. In other cases, the actual occupation carries with it dominion over all that is essential to the real use of the settlers; over all, in fact, that is necessary for the integrity and security of the possession.<sup>1</sup>

Under the title "Occupation" are ranged Discovery, Use, and Settlement.

**Prescription.**—The rule known as the *Law of Prescription* is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference of the original defect of title or intention to relinquish, fairly to be drawn from silence and neglect.<sup>2</sup>

Prescription is given by Sir R. Phillimore<sup>3</sup> as the second mode of original acquisition. He quotes (p. 301) the names of eminent authors who have regarded *prescription* as a mode of acquiring property; he states, however, that Klüber, Martens, and others decline to recognise it, and in this instance the view of the minority appears preferable, for this reason. Both in the Roman and the modern legal nomenclature *usucapio* and *prescriptio*, if not essentially convertible terms, are at least different terms applied to express

<sup>1</sup> *Vide* Phillimore, *Internat. Law*, vol. i., p. 274 *et seq.*

<sup>2</sup> Wheaton, p. 304. Grotius, *de Jur. Bel. ac Pac.*, lib. ii. c. 4.

<sup>3</sup> *International Law*, vol. i., p. 293 *et seq.*

one and the same idea, viz., a right acquired in a thing as the result of occupation or possession during a given time. The proper use of the two terms appears to be this—*usucapio* should be employed to express the *active* fact of dominion acquired by continued occupation or possession ; *prescriptio* to express the *passive* loss of right to vindicate a title to the property which the prescribed has by his laches suffered another to acquire by *usucapio*. In this sense, the term *prescriptio* should be confined to adjective law, and used to express one form of legal presumption arising under the municipal maxim, *ut sit finis litium* ; but see Phillimore, vol. i. p. 292 *et seq.* ; Wheaton, p. 303 *et seq.*

**The British Empire.**—The British Empire comprises Great Britain and Ireland, its Colonies and Dependencies.—‘The colonies and dependencies of Great Britain embrace about one-third of the surface of the globe, and nearly a fourth of its population. Official returns state the area of these possessions to be 4,556,317 square miles, or more than thirty times the extent of the United Kingdom. Of this vast dominion, nearly a million square miles are in Asia, more than two millions and a half in Australasia, and more than half a million in North America. The number of subjects, according to the latest returns, was nearly 168 millions, or more than four times the population of the United Kingdom, India alone contributing upwards of 155 millions, or about six times the population of Great Britain. The following table gives the area and population of each of the colonies and dependencies after the most recent official returns<sup>1</sup> :—

<sup>1</sup> The Statesman's Year-Book, 1872, p. 273.

POSSESSIONS.	ESTIMATED AREA.	POPULATION.
	Square miles.	Number.
India (1869) ... ..	988,091	155,348,090
Straits Settlements (1862) ... ..	1,095	282,831
NORTH AMERICA.		
Ontario and Quebec (1868) ... ..	331,290	3,201,351
New Brunswick (1868) ... ..	27,037	302,950
Nova Scotia (1868) ... ..	18,671	375,511
Prince Edward Island (1868) ... ..	2,173	93,338
Newfoundland (1869) ... ..	40,200	146,536
British Columbia (1861) ... ..	200,000	34,816
Manitoba ... ..	13,000	17,000
Total for North American Colonies	632,361	4,171,502
Bermuda (1861) ... ..	24	11,796
Honduras (1861) ... ..	13,500	25,635
WEST INDIES (1861).		
Bahamas ... ..	3,021	35,487
Turks Island ... ..		4,372
Jamaica ... ..	6,400	441,264
Virgin Islands ... ..	57	6,051
St. Christopher ... ..	103	24,440
Nevis ... ..	50	9,822
Antigua ... ..	183	37,125
Montserrat ... ..	47	7,645
Dominica ... ..	291	25,666
St. Lucia ... ..	250	29,519
St. Vincent ... ..	131	31,755
Barbadoes ... ..	166	152,727
Grenada ... ..	133	36,672
Tobago ... ..	97	15,410
Trinidad ... ..	1,754	84,438
British Guiana ... ..	76,000	155,026
Total for West Indies	88,683	1,097,419
Falkland Islands (1869) ... ..	7,600	690
AUSTRALASIA.		
New South Wales ... ..	323,437	431,412
Victoria (1871) ... ..	86,831	659,855
South Australia (1871) ... ..	383,328	188,995
Western Australia ... ..	978,000	21,065
Tasmania ... ..	26,215	97,368
New Zealand ... ..	106,259	208,682
Queensland ... ..	678,000	96,172
Total for Australasia	2,582,070	1,683,707

POSSESSIONS.	ESTIMATED AREA.	POPULATION.
	Square miles.	Number.
Hongkong (1865) ... ..	32	125,504
Labuan (1865) ... ..	45	3,828
Ceylon (1867) ... ..	24,454	2,096,777
Mauritius (1869) ... ..	708	322,917
Natal (1869) ... ..	16,145	315,250
Cape of Good Hope (1865) ... ..	200,610	566,158
St. Helena (1861) ... ..	47	6,860
Gold Coast (1858) ... ..	6,000	151,346
Sierra Leone (1868) ... ..	468	55,374
Gambia (1861) ... ..	21	6,939
Gibraltar (1865) ... ..	1½	24,095
Malta (1866) ... ..	115	146,852
Heligoland (1861) ... ..	5½	2,172

**Dominion—Jurisdiction.**—Having determined the limits of the territory of the Sovereign, we proceed to enquire further, What are the rights of the Sovereign as to and within that territory? The question may be answered by the single word—*Dominion*. What, then, does the sovereign right *Dominion* involve? Assume for the moment the Sovereign to be an individual, a man in a state of nature, without any species of human control; his territory to be the small plot of ground he occupies; his property the rude hut built upon that plot, with the few articles such a person would be likely to possess. Such a being enjoys in its entirety the sovereign right of dominion: he is free to act as he pleases, and to put his property to what use he thinks fit. But it is obvious that this freedom, perfect as it may be, is nevertheless subject to the laws of nature, and must be exercised conformably to his *notions, correct or otherwise, of his personal advantage*. Again, suppose this being, in the course of time, to become possessed of numerous subjects, of vast estates, of untold treasure. All that has taken place has been an increase of the

things—including persons—under his control. His sovereign right has in no way been affected; consequently his motive of action remains the same. But though the *motive* is unchanged, his present *acts* will differ as widely from his former as do his circumstances, because in each case his acts are regulated by those circumstances. In the former case, his sovereign right, being confined to the *things* under his control, may be expressed by the word *dominion*. His present sovereign right, extending to the *persons* as well as the *things* under his control, may be expressed by the word *jurisdiction*. The one imports the right of *using a thing*; the other imports that of controlling or directing *human beings*, both as to their persons and property. When, therefore, it is said that *dominion* and *jurisdiction* belong to the Sovereign, or are sovereign rights, and it is also said that the sovereign rights of Great Britain are lodged in the hands of the Parliament—that is, in the hands of the King, the Lords, and the Commons,—all that is said is, that the people of Great Britain have the right to, and do in fact, regulate their own conduct and their own property, in the manner they deem most advantageous to their interests as a nation.

The consequences of sovereign jurisdiction appear to be embraced within the following propositions, which, though in many respects they may be said to cross and involve each other, nevertheless may, with advantage to the student, be given as distinct propositions.

1. Every sovereign possesses and exercises exclusive *dominion* and *jurisdiction* throughout the full extent of his territory: therefore—

2. Every sovereign is entitled to the exclusive power of legislation, in respect to the personal rights and civil

state and condition of his citizens, and in respect to *all* property situated within his territory :<sup>1</sup> consequently—

3. Every person, whether subject or alien, while within the territory of any sovereign, is answerable to both the criminal and civil laws of that sovereign.

4. The judicial power of every sovereign extends to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, *wherever the cause of action may have originated.*<sup>2</sup>

5. All persons in the territory, whether native or not, and all property therein, as well as *acts and contracts* done or entered into within it, should be controlled by the laws of that State :<sup>3</sup> but as—

6. No State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not ; effect must be given, if at all, to its laws within the jurisdiction of another sovereign by the express authority of that sovereign.<sup>4</sup>

7. Even a criminal sentence has no direct extra-territorial operation either upon the person or property of the offender ; and if he is convicted of an infamous crime, attended with civil disqualifications in his own country, such a sentence can have no legal effect in another independent State. A valid sentence may, however, have certain indirect and collateral effects in other States ; for example, it would be an effectual bar (*exceptio rei judicatæ*) to a prosecution in any other State.<sup>5</sup>

8. Both the public and private vessels of every nation,

<sup>1</sup> Wheaton, p. 160.

<sup>2</sup> *Ib.*, p. 285.

<sup>3</sup> *Ib.*, p. 161.

<sup>4</sup> See 'Comity,' p. 284.

<sup>5</sup> *Ib.*, p. 238 *et seq.*

on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong.<sup>1</sup>

9. The jurisdiction which the nation has over its public and private vessels is *exclusive* only so far as respects offences against its own municipal law.<sup>2</sup>

10. A State cannot arrest the person or property of a supposed offender against its municipal laws within the jurisdiction of another State; but if it can make the arrest elsewhere, it can punish for the offence there committed.<sup>3</sup>

11. The jurisdiction acquired by the ordinary municipal tribunals over the persons or property of a foreigner is derived from his *consent*, either *expressed* by his voluntarily bringing the suit, or is *implied* by the fact of his bringing his person or property within the territory.<sup>4</sup>

12. The judicial power of every independent State extends, with the qualifications mentioned (page 282), to (1) The punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory; (2) The punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports; (3) The punishment of all such offences by its subjects, wheresoever committed; (4) The punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed.<sup>5</sup>

**Self-Preservation.**—Sir Travers Twiss says,—‘Every nation owes, as a duty to itself in the first instance, and

<sup>1</sup> Wheaton, p. 208.

<sup>4</sup> *Ib.*, p. 674.

<sup>2</sup> *Ib.*, p. 209.

<sup>5</sup> *Ib.*, p. 230.

<sup>3</sup> *Ib.*, p. 231.

in preference to all other nations, to do everything that can promote its own happiness and perfection; but in so doing, it must not impair that of another nation.<sup>1</sup> In these few words the learned writer lays before us the whole doctrine of *self-preservation*; he indicates the utmost limit to which a nation is justified in pushing its enterprise; the precise moment when it may say to its rival, "Thus far shalt thou go, but no farther;" he defines with unmistakable clearness the border-line upon which every nation desirous of doing its duty to itself and others, by steadily keeping its eye fixed, would, one would suppose, rarely err. No better example could, however, be adduced of the wide difference between theory and practice. Such, indeed, are the vast complications of human affairs, the apparently inextricable mazes in which the mind of man, when contemplating as a whole the many branches of the human family, with their almost infinitely diversified necessities, desires, and aspirations, is lost, that we are driven to say, with Wheaton,—

'This proposition introduces the most difficult problem of International Law, Where does this right begin and end? It obviously exists to repel actual assault. Nothing can be less open to dispute than the trite saying, "Prevention is better than cure." There is, then, clearly, a point where the duty of self-defence demands the attempt to annihilate the thawing snake, to pierce the gathering cloud, or to cripple the increasing powers that threaten danger. But who is to declare the snake, the cloud, or the danger?

'As independence is an essential condition of nationality, a nation will be justified in doing or practising

<sup>1</sup> Law of Nations—Peace, p. 13.

whatever is necessary for the maintenance of its independence. The right of self-defence is accordingly a primary right of Nations, and it may be exercised either by way of resistance to immediate assault, or by way of precaution against threatened aggression.<sup>1</sup> Indeed, self-preservation is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end;<sup>2</sup> it therefore involves self-defence, which in turn involves the right to require the military service of all, and the maintenance of belligerent capacity.

‘Thus a Nation, after it has been attacked, and has worsted its enemy, will be justified in taking precautions against a second attack, by depriving its enemy of the means of renewing his aggression.’<sup>3</sup>

The Law of Nations accordingly allows independent States to vindicate their rights, and redress their injuries, by recourse to war, when all amicable means of obtaining satisfaction have failed. In short, every State has the right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy, were they not subject to the laws of civil society.

‘This indefeasible right of every nation to provide for its own defence is classed by Vattel amongst its perfect rights.’

‘Neither,’ says Lord Bacon, ‘is the opinion of some

<sup>1</sup> Twiss, *Law of Nations—Peace*, p. 11.

<sup>2</sup> Wheaton, p. 115.

<sup>3</sup> Twiss, *Law of Nations—Peace*, p. 13.  
*Droit des Gens, Préliminaires*, § 17.

of the Schoolmen to be received, that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war.<sup>1</sup>

‘All nations have a right to combine their strength for the purpose of repressing any one or more nations which seek to infringe any cardinal rule of international life.’<sup>2</sup>

‘Kings,’ says Bacon, ‘have to deal with their neighbours, their wives, their children, their prelates or clergy, their nobles, their second nobles or gentlemen, their merchants, their commons, and their men of war; and from all these arise dangers, if care and circumspection be not used. First for their neighbours; there can no general rule be given, the occasions are so variable, save one, which ever holdeth; which is, *that Princes do keep due sentinel, that none of their neighbours do overgrow so by increase of territory, by embracing of trade, by approaches, or the like, as they become more able to annoy them than they were.* And this is, generally, the work of standing Counsels to foresee and to hinder it. During that triumvirate of Kings, King Henry VIII. of England, Francis I. of France, and Charles the fifth Emperor, there was such a watch kept that none of the three could win a palm of ground but the other two would straightways balance it, either by confederation, or, if need were, by a war: and would not in anywise take up peace at interest.’

We say it is not possible to lay down any precise rule

<sup>1</sup> Essay on Empire. Grotius lays down the same doctrine, *De Jure Belli et Pacis*, c. i. §§ 2, 3.

<sup>2</sup> Vattel, *Droit des Gens*, liv. 2, § 53.

<sup>3</sup> Bacon's Essays, ‘Empire.’

by which to determine in what cases the absolute right of self-preservation warrants intervention, and especially armed intervention. For instance, you see a man walking along a road, at the end of which there is a precipice, over which his fall would be certain destruction; but as he is a stranger to you, it is impossible to say that he is not as alive to the danger as yourself; beside which, there is at least one turning in the road before the precipice can be reached; it may be his intention to take that turning, or it may be his intention to walk to the brink, dark as it is getting, simply for amusement. You hesitate to speak, lest your comment should prove impertinence. Now, at what point, at what moment, would your scruple be overcome by the conviction that, risking the impertinence, you had a duty to perform—at least, to warn him of the danger? At what point, assuming that his destruction would imperil your own interests, would you be justified in seizing him by the collar, or otherwise forcibly restraining him from the prosecution of his dangerous career? Apply, then, this illustration to the case of neighbouring Sovereigns—and, to put the case more forcibly, assume one of them to be—(1) raising and maintaining a military force obviously out of all proportion to his necessities as a peaceful neighbour; (2) forming alliances with other Sovereigns of a known war tendency; or (3) pursuing such a course of domestic policy as, in all human probability, must shortly involve him in a civil war, an event most ruinous to each of his neighbours; or (4), having been victorious in a war with a common neighbour, so despoiling his vanquished foe as to make the renewal of hostilities, at no distant period, inevitable, thus keeping the

whole fraternity of nations in restless anxiety, and necessitated, at enormous cost, to maintain huge military establishments. The reader will more readily multiply instances than solve the problem which, in all ages, has taxed the ingenuity of the most skilful. I venture to make a short extract bearing upon the point, from the Laws of Menu, which will not fail to interest the reader:—‘The forces of the realm must be immediately regulated by the Commander-in-Chief; the actual infliction of punishment, by the officers of criminal justice; the treasury and the country, by the King (Sovereign) himself; peace and war, by the Ambassador; for it is the Ambassador alone who unites, who alone disjoins the united; that is, he transacts the business, by which kingdoms are at variance or in amity. In the transaction of affairs let the ambassador comprehend the visible signs and hints, and discover the acts, of the foreign King by the signs, hints, and acts of his confidential servants, and the measures which that King wishes to take by the *character and conduct* of his ministers. Thus having learned completely from his ambassador all the designs of the foreign prince, let the King so apply his vigilant care that he bring no evil on himself.’<sup>1</sup>

Sir Robert Phillimore<sup>2</sup> says, the following grounds, either separately or in conjunction, have been deliberately and solemnly proclaimed as justifying causes of Foreign Intervention<sup>3</sup>:—

<sup>1</sup> Institutes of Hindu Law, or The Ordinances of Menu according to the Gloss of Calluca, by Sir William Jones, chap. 7, §§ 65—68.

<sup>2</sup> International Law, vol. i. pp. 467, 468.

<sup>3</sup> For instances of each, see Phillimore’s International Law, vol. i. pp. 467—531.

1. Sometimes, but rarely, in the domestic concerns and internal rights of self-government.

2. More frequently, and upon far surer grounds, with respect to the territorial acquisitions or foreign relations of other States, when such acquisitions or relations threaten the peace and safety of other States.

In the former case, the just grounds of Intervention are—

(a) Self-Defence, when the Domestic Institutions of a State are inconsistent with the peace and safety of other States.

(b) The Rights and Duties of a guarantee.

(c) The Invitation of the Belligerent Parties in a civil war.

(d) The Protection of Reversionary Right or Interest.

In the latter case, the just grounds of Intervention are :—

(e) To preserve the Balance of Power ; that is, to prevent the dangerous aggrandisement of any one State by external acquisitions.

(f) To protect Persons, subjects of another State, from *persecution* on account of professing a Religion not recognised by that State, but identical with the Religion of the Intervening State.

As to the cases *a*, *b*, *c*, *d*, and *e*, it is difficult, if not impossible, to lay down any precise rule governed by principle ; each instance must be governed by its peculiar circumstances. Perhaps the best method of testing the soundness of *f*, is to inquire whether, springing from his natural right of self-preservation, the Pope possesses the absolute Sovereign Right of Intervention by force of arms against Great Britain for refusing the throne to a Papist, an act which he possibly considers

persecution ; or against the Emperor of Germany for expelling the Jesuits, about which he may be presumed to entertain no doubt.

Martens<sup>1</sup> observes, ' Toutes les guerres auxquelles la religion a servi de motif ou de prétexte ont fait voir, 1°, que jamais la religion n'a été le seul motif pour lequel les puissances étrangères sont entrées en guerre ; 2°, que lorsque la politique s'accorde avec les intérêts de leur religion, elles ont effectivement soutenu la cause de celle-ci ; 3°, mais que toujours le zèle religieux a cédé aux motifs de politique ; et que plus d'une fois même celle-ci a entraîné à des démarches directement opposées aux intérêts de leur religion.'

Interferences to preserve what is termed *the balance of power* have been generally confined to prevent a Sovereign, already powerful, from incorporating conquered provinces with his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils and conduct of other independent States. Distant colonies and dependencies are, however, generally supposed to weaken and to render more vulnerable the metropolitan State ; but though in some respects this is undoubtedly true, no greater error can be committed than indifference to the compensating value which in many cases infinitely surpasses the deteriorating influence. What, for instance, would England have been without her colonies, the mother of her countless fleets, the homes of her surplus population, the mines from which she has dug her wealth ?

The ambition of Spain and the House of Austria under Charles V. and his successors was checked by

<sup>1</sup> Précis du Droit des Gens, tom. i., § 114, p. 312, ed. 1864.

the other European Powers, and the balance of power adjusted by the Treaty of Westphalia, 1648. Russia, Austria, Prussia, and Great Britain interfered to check the progress of the revolutionary principles, and the extension of the military power of France, which terminated in the Congress of Aix-la-Chapelle, 1818. But as it is impossible to lay down any absolute rule on the subject of intervention beyond this, that it is only justifiable when the internal transactions of another State seriously endanger the immediate security or essential interests of the party interfering, it is needless to multiply examples.<sup>1</sup>

**Derivative Sovereign Rights**, sometimes styled *Relative Sovereign Rights*, at others *conditional* or *hypothetical rights*,<sup>2</sup> may be ranged under one of two heads: those pertaining to pacific relations, which may be styled *Derivative Pacific Rights*; and those growing out of hostile relations, which we may call *Derivative Hostile Rights*. These latter may be subdivided into *Quasi-belligerent* and *Belligerent Rights*.

<sup>1</sup> See Wheaton, pp. 119—136.

<sup>2</sup> The rights which sovereign States enjoy with regard to one another may be divided into rights of two sorts: primitive or *absolute* rights; conditional or *hypothetical* rights (Klüber, § 36). 'Every State,' says Wheaton, 'has certain sovereign rights, to which it is entitled as an independent moral being—in other words, because it is a State. These rights are called the *absolute* international rights of States, because they are not limited to particular circumstances, and are: 1, rights of self-preservation and independence; 2, rights of civil and criminal legislation; 3, rights of equality; 4, rights of property (Wheaton, pp. 303—372). The rights to which sovereign States are entitled, under particular circumstances in their relations with others, may be termed their *conditional* international rights, and they cease with the circumstances which gave rise to them. They are consequences of a quality of a sovereign State, but consequences which are not permanent, and which are only produced under particular circumstances. Thus war, for example, confers on belligerent or neutral States certain rights, which cease with the existence of the war.' (Wheaton, p. 116.)

Having already endeavoured to show that intercourse between the sovereigns and subjects of different nations is a human necessity, and having indicated the *original sovereign rights*, we proceed to consider the remaining rights, or those which flow from the intercourse of independent nations.

The basis upon which every derivative right rests is *Reciprocity*.

The source of every derivative right is *Custom or Treaty*.

The object of every derivative pacific right is the facilitating of friendly intercourse.

The object of every belligerent right, which has its origin in treaty, should be, and must be presumed to be, the diminution of the horrors of war.

Reciprocity is recognised as a principle of international law, both on the grounds of justice and of sound policy; it has been recognised in England by statute at least from the time of Magna Charta, which enacts, section 41, that, at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are kept and treated in their country.<sup>1</sup>

**Commerce.**—It is to commerce, to the merchant, to the man who leaves his native home, carrying with him an atom of its produce to sell or barter in a foreign land—to the merchant ship steadily ploughing its way over broad oceans, to give to men of different regions a taste of the varied blessings the Almighty has spread over the face of the earth, that we must ascribe the origin, and to which we must look for the ultimate perfection, of International Law. From mutual intercourse grow mutual advantage, mutual confidence, and mutual

<sup>1</sup> See *ante*, p. 117.

respect, before which the bigotry of creeds, the prejudices of nationality, and the jealousies of rival potentates, relicts of a dark age, are powerless to stop the progress of man in his march toward that not impossible, though distant millennium, when the differences of nationality shall become mere differences of family, and when war between nations shall be held as odious and as absurd as duelling is now held in the esteem of English gentlemen. To trace the history of modern commerce is to trace the history of modern international law; to know the future of the one is to know the future of the other. England and America have long been the merchant princes of the earth; America and England, second to none either in the ability or the means to fight, have recently adopted a mode of settling differences equally honourable to the sovereigns of either, and inestimably more advantageous to the subjects of both. If it is too much to say that the prosperity of a country may be gauged by its contact with foreigners—a proposition which would embrace the indiscriminate reception of the outcasts of other nations—it is not too much to say that no country ever attained the greatness of which it was naturally capable, that shut its gates against the stranger.

Of this there is but little room for doubt. The merchants opened the gates of nations to foreigners. The intercourse commenced by them led to the establishment of consuls, who prepared the way for resident diplomatic ministers and legal *comity*.

**Consulates.**—Sir Robert Phillimore says,—‘The origin of the institution of foreign consulate is probably traceable to that domestic consulate which, after the fall of the Western Empire, was, during the earlier part of the

Middle Ages, founded in most of the maritime cities of the south of Europe connected with commerce and navigation, the jurisprudence and authority of which rested mainly upon principles gleaned from the Roman and Greek law.

‘The tribunals of the domestic institution were occupied by judges known by the name of *Juges Consuls*, or *Consuls Marchands*, while the foreign institution was dependent on certain officers known by the title of *Consuls d’outre mer*, or *Consuls à l’étranger*. These latter officers were persons sent by independent countries, or free cities, to the seaports and adjacent towns of foreign kingdoms, for the purpose of protecting the national commerce, especially in matters of shipwreck, of watching over national interests and privileges, and of adjusting disputes between national sailors and merchants.

‘The perils to which infant commerce was exposed, and the insecurity of personal intercourse with foreigners during the times of oppression which followed the overthrow of the Western Empire, rendered the two following objects matters of the greatest importance: 1, the obtaining in foreign countries a place of *safe deposit* for merchandise; 2, a *jurisdiction* within the limits of it, independent of the country in which it was situated, for at that period a system seems to have prevailed that every European should be amenable *only* to the law of his native country.’<sup>1</sup>

As commercial intercourse extended, and the foreign merchant came to be regarded with favour by the Sovereigns of the countries he visited, their Courts gave him justice, and during the seventeenth century

<sup>1</sup> International Law, vol. ii. pp. 258—260.

the *ex-territorial* jurisdiction of the consul ceased in Christian Europe.

The present institution of Public Consulates dates from the sixteenth century. These officers are not, as were their predecessors, the nominees of merchants, but are appointed by their respective Sovereigns, and commissioned by them, with the sanction, termed the *Ezequatur*, of the State to which they are sent, to watch over the commercial interests of their fellow-countrymen in that State. The Consul, as such, has no diplomatic character; it is not unfrequent, however, to accredit the Consul sent to Mahomedan countries as agent for political purposes, or as *Chargé d'Affaires*, in which case he is entitled to the privileges of a Public Minister;<sup>1</sup> and, under special treaty engagements, the Consuls and Vice-Consuls of Great Britain in the Levant and in China exercise jurisdiction over British subjects, and between British subjects and native inhabitants.

The duties of a Consul, even in the confined sense in which they are commonly understood, are important and multifarious. It is his business to be always on the spot, to watch over the commercial interests of the subjects of the State whose servant he is; to be ready to assist them with advice on all doubtful occasions; to see that the conditions in commercial treaties are properly observed; that those he is appointed to protect are subjected to no unnecessary or unjustifiable demands in conducting their business; to represent their grievances to the authorities at the place where they reside, or to the ambassador of the Sovereign appointing him, at the Court on which the consulship depends, or

<sup>1</sup> See Twiss, *Law of Nations—Peace*, p. 316 *et seq.*

to the Government at home ; in a word, to exert himself to render the condition of the subjects of the country employing him, within the limits of his consulship, as comfortable, and their transactions as advantageous and secure as possible.<sup>1</sup>

It is his duty to relieve all distressed British mariners, to allow them 6*d.* daily for their support, and to send them home in the first British vessel that sails for England (1 Geo. II., s. 2 ; c. 14, s. 12). Under certain circumstances he is authorized to summon a Naval Court, whenever a complaint is made to him by the master of a ship, which, in his opinion, requires immediate investigation (Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, s. 260). He must not permit a British merchant ship to leave his port without her passport, which he is not to grant until the master and crew thereof have satisfied all just demands upon them. It is his duty to claim and recover all wrecks, cables, and anchors, belonging to British ships, found at sea by fishermen or other persons, to pay the usual salvage, and to communicate a report thereof to the Navy Board. Consuls and Vice-Consuls are empowered to administer oaths in all cases respecting quarantine (46 Geo. III., c. 98, s. 9), also in other cases, and to act as notary (6 Geo. IV., c. 87, s. 20, and 18 and 19 Vic. c. 42), and are instructed, if requested, to attend all arbitrations affecting property between masters of British ships and the freighters, being inhabitants of the place where they are stationed.<sup>2</sup>

Some nations permit, and others allow, their Consuls

<sup>1</sup> Wharton's Law Lexicon, 'Consul.'

<sup>2</sup> See Grenhow's Shipping Law, 'Consul.'

to trade. A Consul who is engaged in trade is amenable, in all that regards his trade, to the local jurisdiction equally as any private merchant; and although he may be a natural-born subject of the State whose commission he bears, he will, notwithstanding his commission of Consul, acquire by continuous residence and trade a commercial domicile in the country in which he maintains his trading establishment; and his property may thus, in case of war, be liable to be treated as the property of an enemy by any power at war with the country in which he carries on his trade.<sup>1</sup>

**Legation.**—No State, strictly speaking, is obliged by the positive Law of Nations to send or receive Public Ministers, but the usage and comity of modern nations seems to have established a sort of reciprocal duty in this respect. The rights of Ambassadors were not, however, firmly established until the 17th century, and the institution of resident permanent legations at all the European Courts did not take place till after the peace of Westphalia in 1648.

In Monarchies, whether absolute or constitutional, the prerogative of sending Public Ministers usually resides in the Sovereign. In Republics it is vested either in the Chief Magistrate, or in a Senate or Council, conjointly with, or exclusive of, such Magistrate.

‘As no State is under a *perfect* obligation to *receive* Ministers from another, it may annex such conditions to their reception as it thinks fit; but when once received, they are, in all respects, entitled to the privileges annexed by the Law of Nations to their public character.’<sup>2</sup> By the rules of the Congress of Vienna, 19th

<sup>1</sup> Twiss, *Law of Nations—Peace*, p. 318.

<sup>2</sup> Wheaton, p. 379.

March, 1815, and of Aix-la-Chapelle, 21st November 1818, Public Ministers are divided into four classes :— 1, Ambassadors and Papal Legates or Nuncios ; 2, Envoys, Ministers, or others accredited to Sovereigns (*auprès des Souverains*) ; 3, Ministers resident accredited to Sovereigns ; 4, Chargés d’Affaires, accredited to the Minister of Foreign Affairs.

Ambassadors, and other Public Ministers of the first class, are exclusively entitled to what is called the *representative* character ; and the right of sending Ambassadors is exclusively confined to crowned heads, the great Republics, and other States entitled to royal honours.

To the rule already laid down, that every person, whether subject or alien, while within the territory of a Sovereign, is amenable to both the civil and criminal law of that Sovereign, Wheaton states the following exceptions :—

‘ 1. The person of a foreign Sovereign, going into the territory of another, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State, under the permission which, in time of peace, is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides.

‘ 2. The person of an Ambassador, or other Public Minister, whilst within the territory of the State to which he is delegated, is also exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he

locally resides.<sup>1</sup> This personal exemption also extends to the wife, family, secretaries, and servants of the Minister. The civil and criminal jurisdiction over these persons rests with the Minister, to be exercised according to the laws and usages of his own country. In respect to criminal offences, modern usage merely authorises him to arrest and send them for trial to their own country. It is competent, however, for the Minister to discharge any servant from his service, or to deliver him up for trial under the laws of the State where he resides.

‘The personal effects or moveables belonging to the Minister, within the territory of the State where he resides, are entirely exempt from the local jurisdiction, as is also his dwelling-house; but any other real or personal property of which he may be possessed within the foreign territory, as proprietor, merchant or fiduciary, is subject to its laws and jurisdiction.’<sup>2</sup> Consuls and other commercial agents, not being accredited to the Sovereign or Minister of Foreign Affairs, are not in general considered as Public Ministers. They are not entitled by the general law of nations to the peculiar immunities of Ambassadors. In civil and criminal cases they are subject to the local law in the same manner as other foreign residents owing a temporary allegiance to the State.

‘A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the Sovereign to whom they belong is in amity, are also in like manner exempt from the civil and criminal jurisdiction of the place.’<sup>3</sup>

<sup>1</sup> Wheaton, p. 188.

<sup>2</sup> *Ib.*, p. 400.

<sup>3</sup> *Ib.*, p. 190.

**The Comity of Nations.**—Having established the fact, that each Sovereign has the exclusive right to enact what laws he thinks fit for the control both of persons and things within his territory, and that within its limits, subject to the exception specified, he has exclusive jurisdiction, there arises this further question—By what law will he determine a dispute between one of his own subjects and a foreigner, or between two foreigners, when within his jurisdiction, should either of these commence an action against the other in one of his courts ?

The laws of any Sovereign can, as we have seen, only have effect or obligation within his own territory ; they can therefore only gain a like effect within the territory of another Sovereign by virtue of the express or tacit consent of that Sovereign. ‘A nation,’ says Sir Travers Twiss,<sup>1</sup> ‘may prohibit the operation of all Foreign Laws, and refuse to recognise any rights growing out of them within its territory. On the other hand, it may prohibit some Foreign Laws, and give operation to others, either absolutely or *sub modo*. If the Statute or Common Law of the nation speaks clearly in such matters, it must be obeyed by all within the local limits of its authority. When both are silent, European Courts of Justice, under the *Comity* of Nations presume the tacit adoption of the Laws of a Foreign Nation by their own Government, in matters which regard Foreign Interests, unless they are repugnant to its own policy, or prejudicial to its own interests. No nation can be justly required to give up its own fundamental policy and institutions in favour of those of another nation ;

<sup>1</sup> Law of Nations—Peace, vol. i. p. 218.

much less can any nation be required to sacrifice its own interests in favour of another nation, or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or with its conscientious regard to justice or duty. It is, therefore, essentially a question of *Comity* between Nations to what extent effect shall be given to Foreign Law, and all questions of Comity depend upon a variety of circumstances which cannot be reduced to any certain rule.'

Wheaton<sup>1</sup> says, 'There is no obligation, recognised by legislators, public authorities, and publicists, to regard foreign laws ; but their application is admitted from considerations of *utility*, and the *mutual convenience* of States—*ex comitate, ob reciprocam utilitatem*.'

Upon this point Huberus lays down the three following maxims:—

1. The laws of every State have force within the limits of that State, and bind all its subjects.

2. All persons within the limits of a State are considered as subjects, whether their residence is permanent or temporary.

3. By the Comity of Nations, whatever laws are carried into execution within the limits of any State, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens.

From which he deduces the following general corollary as applicable to the determination of all questions arising out of the conflict of the laws of different States in respect to private rights of persons and property.

<sup>1</sup> International Law, p. 162.

‘ All transactions in a court of justice, or out of court, whether testamentary or other conveyances, which are regularly done or executed according to the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the other hand, transactions and instruments which are done or executed contrary to the laws of a country, being void at first, never can become valid; and this applies not only to those who permanently reside in the place where the transaction or instrument is done or executed, but to those who reside there only temporarily; with this exception only, that if another State, or its citizens, would be affected by any peculiar inconvenience of an important nature, by giving this effect to acts performed in another country, that State is not bound to give effect to those proceedings, or to consider them as valid within its jurisdiction.’<sup>1</sup>

Remembering that Private International Law has no proper place in this volume, we may, however, be pardoned for stating more in detail a few of its fundamental principles, inasmuch as they tend to shed light upon the doctrine of Comity; in other words, to show to what extent, by common consent, nations have agreed to smooth the path to free intercourse between the subjects of different nationalities.

**Personal Status.**—The general rule as to personal status is,—The laws of the State, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country, *e.g.*, citizenship, legitimacy, majority, bankruptcy, mar-

<sup>1</sup> Huberus, *Prælectionum Juris Romani (Civilis)*, pars ii., lib. i., tit. 3, § 2, *De Conflictu Legum*.

riage, divorce; subject, however, to the following exceptions :—

1. Every independent Sovereign State may naturalize foreigners, and so confer upon them the privileges of their acquired domicile. 2. Every independent State has a sovereign right to regulate the property within its State. 3. A bankrupt's certificate under the laws of his own country cannot operate in another State to discharge him from his debts contracted with foreigners in a foreign country.<sup>1</sup>

**Nuptial Contracts.**—The personal capacity as to age, consent of parents, prohibited degree of affinity, &c., is generally governed by the law of the State of which the party is a subject. The ceremony is always regulated by that of the place where it is celebrated, and if valid there, it is considered valid everywhere else, unless made in fraud of the laws of the parties' domicile.

**Property.**—A person who possesses real property in a foreign country, if living elsewhere, is called a non-resident landowner (*sujet forain*). A person who has entered into a contract in a foreign country is termed a temporary resident (*sujet passager*).

**Realty.**—Real property is governed exclusively by the law of the place where it is situated, or by what is termed the *lex loci rei sitæ*, as to the tenure, the title, and the descent of such property.<sup>2</sup> By the laws of England and of the United States, a deed or will affecting it must be executed with the formalities required by the law of the place where the land lies; but by the laws of other European nations, the deed or will is valid if executed according to the law of the place where it is

<sup>1</sup> Wheaton, p. 178.

<sup>2</sup> *Ib.*, p. 165.

made, provided by the *lex loci rei sitæ*, the property may be alienated by deed or will.<sup>1</sup>

All real and possessory actions must be brought in the place where the property lies.

**Personalty—*Mobilia*.**—In the case of personal property, the *lex domicilii* of its owner prevails over the law of the country where such property is situated, so far as respects the rule of inheritance. *Mobilia ossibus in hærent, personam sequuntur*. Thus, the law of the place where the owner of personalty was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects, wherever they may be situated.<sup>2</sup>

In the case of personal property within the territory, foreign laws may furnish the rule of decision in cases where they apply, but the forms of process, rules of evidence, and prescription, are governed by the *lex loci*.

The law of a place where an instrument relating to personal property is executed by a party domiciled in that place, governs, as to the external form, the interpretation and the effect of the instrument—*locus regit actum*.<sup>3</sup>

**Contract.**—A contract valid by the law of the place where it is made is, generally speaking, valid everywhere else, except, 1st, with respect to matters properly governed by the *lex loci rei sitæ*—*e.g.* real property, personal status; 2nd, where it injuriously conflicts with the laws of another State relating to its policy, public health, commerce, revenue, &c.; 3rd, wherever, from the nature of the contract itself, or the

<sup>1</sup> Wheaton, p. 165.

<sup>2</sup> See *Stanley v. Bernes*, 3 Haggard Eccl. Rep. 373—465. *Moore v. Darell*, 4 Haggard, p. 346—354.

<sup>3</sup> See *Trotter v. Trotter*, 3 Wilson and Shaw, p. 407.

law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country, everything which concerns its execution is to be determined by the law of that country ;<sup>1</sup> 4th, all judicial proceedings upon a contract are regulated by the *lex loci fori*,—e.g., rules of evidence, statutes of limitation, and mode of procedure.

Whatever belongs to the obligation of the contract is regulated by the *lex domicilii* or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.

The obligation of the contract, it may be observed, consists of—1, The personal capacity of the parties to the contract ; 2, The will of the parties expressed, as to the terms and conditions of the contract.

There is an essential difference between the *form* of the contract and the *extrinsic evidence* by which the contract is to be proved. Thus the *lex loci contractus* may require certain contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the intrinsic evidence by which the existence and terms of the contract are to be proved in a foreign tribunal, is regulated by the *lex fori*.

**Judgments in Rem.**—The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem* is conclusive as to the proprietary interest in, and title to, the thing in question, whenever the same comes incidentally in controversy in another State.

‘The most eminent public jurists,’ says Wheaton, ‘concur in asserting the principle that the final judg-

<sup>1</sup> Wheaton, p. 183.

ment rendered in a personal action, in a court of competent jurisdiction of one State, ought to have the conclusive effect of a *res adjudicata* in every other State whenever it is pleaded in bar of another action for the same cause.<sup>1</sup>

The law of England, and of other countries where the English Common Law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delicto* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. In those countries which have modelled their municipal jurisprudence upon the Roman Civil Law, the maxim of that code, *actor sequitur forum rei*, is generally followed, and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

**Crimes.**—Most States, in conformity with the opinion of the majority of the public jurists, make crimes committed by a foreigner within their jurisdiction justiciable by the native courts of the criminal. The Common Law of England, which has been adopted in this respect by the United States, considers criminal offences altogether local, and hence justiciable only by the courts of the country where the offence is committed, but the Legislature of both countries has made various exceptions.<sup>2</sup>

**Extradition of Criminals.**—Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent maintain that, according to the law and usage of nations, every Sovereign State is obliged to refuse an

<sup>1</sup> Elements of International Law, p. 291.

<sup>2</sup> See Wheaton, p. 231.

asylum to individuals accused of crimes affecting the general peace and security of society, whose tradition is demanded by the Government of the country within whose jurisdiction the crime has been committed. On the other hand, Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, and Heffter hold that the extradition of fugitives from justice is a matter of imperfect obligation only. This opinion is confirmed by the fact of the existence of so many special treaties respecting it.<sup>1</sup>

**General Rule.**—‘A State,’ says Wheaton, ‘should confine the application of extradition treaties to such acts as are of common accord regarded as grave crimes, and should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, or of slight offences.’<sup>2</sup>

By the Extradition Act, 1870, 33 and 34 Vic., c. 52, it is provided :—

Sec. 2. ‘Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

‘Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or are suspected of being in the part of Her Majesty’s dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

‘Every such order shall recite or embody the terms

<sup>1</sup> Wheaton, p. 232.

<sup>2</sup> Elements, p. 236.

of the arrangement, and shall not remain in force for any longer period than the arrangement.

‘Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the London Gazette.’

Sec. 3. ‘The following restrictions shall be observed with respect to the surrender of fugitive criminals :

‘(1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character :

‘(2.) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty’s dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded :

‘(3.) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise :

‘(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.’

Sec. 7. ‘A requisition for the surrender of a fugitive criminal of any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

‘If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.’

Sec. 9. ‘When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

‘The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime.’

Sec. 10. ‘In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of Eng-

land, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

‘In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced, as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.’

Sec. 19. ‘Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime, which, if committed in England, would be one of the crimes described in the first schedule to this Act, is surrendered by that foreign State, such person shall not, unless he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty’s dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.’<sup>1</sup>

**Treaties.**—General compacts between nations may

<sup>1</sup> The remaining sections enact:—4. Provisions of arrangement for surrender. 5. Publication and effect of order. 6. Liability of criminal to surrender. 8. Issue of warrant by police magistrate, &c. 11. Surrender of fugitive to foreign State, by warrant of Secretary of State. 12. Discharge of person apprehended, if not conveyed out of United Kingdom within two months. 13. Execution of warrant of police magistrate. 14. Depositions to be evidence. 15. Authentication of depositions and warrants. 16. Jurisdiction as to crimes committed at sea. 17. Proceedings as to fugitive criminals in British possessions. 18. Saving of laws of British possessions. 20. As to use of forms in second schedule. 21. Revocation, &c., of Orders in Council. 22. Application of Act in Channel Islands and Isle of Man. 23. Saving Indian treaties. 24. Power of Foreign State to obtain evidence in United Kingdom. 25. Foreign State includes dependencies. 26. Definitions of terms. 27. Repeal of Acts in third schedule. The Act

be divided into what are called *transitory conventions*, and *treaties* properly so called.<sup>1</sup> A transitory convention is perpetual in its nature, so that, being once carried into effect, it subsists independently of any change in the sovereignty and form of government of the contracting parties. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another.<sup>2</sup> Treaties properly so called, or *fœdera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire of course—

1. In case either of the contracting parties loses its existence as an independent State.

2. Where the internal constitution of government of either State is so changed as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

3. In case of war between the contracting parties, unless such stipulations are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war.

4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory.<sup>3</sup>

**Real and Personal.**—Treaties are divided by insti-

has three schedules containing: 1. A list of crimes to be construed according to the British law. 2. Forms of orders and warrants. 3. Repealed Statutes.

<sup>1</sup> Wheaton, p. 460.

<sup>2</sup> *Ib.*, p. 460.

<sup>3</sup> *Ib.*, p. 471.

tutional writers into *real* and *personal*. The first bind the contracting parties independently of any change in the sovereignty, or in the rulers of the State. The latter include only treaties of mere personal alliance, which, though they bind the State during the existence of the maker, expire with his natural life, or his public connection with the State.<sup>1</sup>

Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds; therefore stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the parties.

**Guaranty.**—The convention of Guaranty is one of the most usual of international contracts. It is an engagement by which one State promises to aid another when it is interrupted or threatened to be disturbed in the peaceable enjoyment of its rights by a third power.<sup>2</sup> Guaranties apply only to rights and possessions existing at the time they are stipulated.<sup>4</sup>

**Surety.**—Writers draw a distinction between a *surety* and a *guarantee*. Vattel says that where the matter relates to things which another may do or give, as well as he who makes the promise,—as, for instance, the payment of a sum of money,—it is safer to demand a *surety* (caution) than a *guarantee* (garant); for the surety is bound to make good the promise in default of the principal, whereas the guarantee is only obliged to use his best endeavours to obtain a performance of the promise from him who has made it.<sup>4</sup>

<sup>1</sup> Wheaton, p. 472.

<sup>2</sup> <sup>3</sup> *Ib.*, p. 476.

<sup>2</sup> *Ib.*, p. 475.

<sup>4</sup> *Ib.*, p. 479.

Treaties of alliance may be either defensive or offensive, or both defensive and offensive.<sup>1</sup>

General alliances are to be distinguished from treaties of limited succour and subsidy.<sup>2</sup>

A treaty to furnish limited succour in the event of hostilities does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral.<sup>3</sup>

Grotius, and the other text writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust—that is, to a war of aggression on the part of the power claiming the benefit of the alliance.<sup>4</sup>

Disputes respecting the meaning of treaties, or their alleged infraction, are commonly adjusted by amicable negotiation between the contracting parties, the mediation by friendly powers, or by reference to the arbitration of some one power selected by the parties.

**Mediation and Arbitration.**—The difference between a Mediator and an Arbitrator consists in this: that the arbitrator pronounces a real judgment, which is obligatory, whereas the Mediator can only give his counsel and advice. The mediation, indeed, is often a simple formality to bring the parties together, and which is afterwards continued from respect to the mediator.<sup>5</sup> Wheaton says,—‘The approved usage of nations authorizes the proposal by one State of its good offices or

<sup>1</sup> Wheaton, p. 479.

<sup>2</sup> *Ib.*, p. 480.

<sup>3</sup> *Ib.*, p. 480.

<sup>4</sup> *Ib.*, p. 480.

<sup>5</sup> *Ib.*, p. 133, note; Garden, *Traité de la Diplomatie*, tom. i., p. 436, note.

mediation for the settlement of the intestine dissensions of another State; and when such offer is accepted by the contending parties, it becomes a just title for the interference of the mediating power. Such a title may also grow out of positive compacts previously existing, such as treaties of mediation and guaranty.<sup>1</sup> The plenipotentiaries to the Congress of Paris, 1856, in their 22nd protocol, express, in the name of their Governments, the wish that the States between whom serious difficulties may arise would, before appealing to arms, have recourse, as far as circumstances will admit, to the good offices of a friendly power. The horrors of the late Franco-Prussian war, when contrasted with the peaceful proceedings of the Geneva Court of Arbitration, make the soundness of this advice too patent to admit of comment.

**Hostile Relations—Quasi-Belligerent Rights.**—As the rules prescribed by the International Code are observed by one nation on the faith of like conduct on the part of others,—or, in other words, as the deportment of nation to nation, like that of man to man, is regulated by *reciprocity*,—there is in international as in individual action three relations: that of *mutual courtesy*; that of *open defiance*, or *war*; and the intermediate condition of *adverse conduct*. Acts on the part of one, though unfriendly, not deemed a just ground of open rupture, nevertheless warrant like conduct on the part of the offended. The International Rights accruing to the injured from such conduct may be designated *quasi-belligerent rights*.<sup>2</sup> All such rights

<sup>1</sup> Wheaton, p. 133.

<sup>2</sup> 'Among the various modes,' says Wheaton (p. 505), 'of terminating the differences between nations by forcible means, short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods,

appear to fall under one of three heads: *retorsion*, *capture*, or *retaliation*; that is, every act of this kind is either—1, a retorting by adopting *like conduct*; as, for example, A and B each possessing a right of way over the property of the other, if A denies to B the exercise of his right, B retorts upon A by refusing him the exercise of his;—2, the capture and exclusive retention by A or B of a given thing to which both A and B lay claim;—3, the doing equivalent injurious acts; for example, if upon A refusing to pay a sum of money due from him to B, B refuses to deliver up the horse of A, that happened to be in his possession, an instance of *embargo*; or goes into A's field, seizes and takes away his horse, an example of *reprisal*.<sup>1</sup>

or other property of the offending nation, found within the territory of the injured State.

'2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

'3. By exercising the right of vindictive retaliation (*retorsio facti*), or of amicable retaliation (*retorsion de droit*); by which last, the one nation applies in its transactions with the other the same rule of conduct by which that other is governed under similar circumstances.

'4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.'

<sup>1</sup> 'Jurists,' says Sir Travers Twiss, 'who confine the use of the term *retorsion* to remedies for departures from comity, have divided reprisals into *negative* and *positive* reprisals, according as they are instituted by reason of the *refusal* of a right or the *infraction* of an injury. According to this nomenclature, which Klüber appears to have introduced, and which is adopted by Wheaton and Phillimore, negative reprisals take place when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims. Positive reprisals, on the other hand, take place when a State seizes persons and effects belonging to another nation, in order to obtain satisfaction for a wrong or an injury. Heffter, on the other hand, following Grotius, Dr. Wolff, and Vattel, limits the term Reprisals to acts of force to which a nation has recourse in order to obtain satisfaction for wrong or injury done to itself or its subjects; and according to this view, those acts which are termed *negative* reprisals are more properly classed under the head of *retorsion*.'—Law of Nations—War, p. 29.

Each of these modes of self-protection is obviously justifiable on the part of the injured, who has no superior to whom he can appeal for the redress of his grievance. They are consequently recognised as sovereign rights, and in former ages, when such a thing as a *science* of International Law was not contemplated, when international relations were of the rudest character, sovereigns permitted the exercise of these rights to individual subjects as an easy mode of relieving themselves from the sovereign duty of personally protecting the subject's rights, his sole return for allegiance—a practice that, it may be presumed, no enlightened government of the present day would countenance. The reader must, however, be cautioned against confounding two essentially different things, though bearing the same name—viz., the reprisals to which we have already referred, and which are consistent with the conditions of peace, and those reprisals which are, properly speaking, belligerent incidents.

**Reprisals.**—Vattel says,—‘ Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then reprisals are accomplished. If the two

nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced ; and then, also, the effects seized may be confiscated.<sup>1</sup>

Reprisals are *negative*, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another State to enjoy a right which it claims. They are *positive*, when they consist in seizing the persons or effects belonging to the other nation, in order to obtain satisfaction. Reprisals are also either *general* or *special*. They are *general*, when the State delivers commissions to its officers and subjects to take the persons and property belonging to another nation, wherever the same may be found. They are *special* when letters of marque are granted to particular individuals who have suffered an injury from the government or subjects of another nation.<sup>2</sup>

**War.<sup>3</sup>—Belligerent Rights.**—I venture to define war to be ‘The attempt to enforce a claim by arms.’ An armed contest between Sovereign Powers is called a *public war*. An armed contest between a Sovereign and his subject is commonly called a *civil war*. A civil war is called by Grotius a *mixed war*, it being, according to him, *public* on the side of the established government, and *private* on the part of the people

<sup>1</sup> Droit des Gens, liv. 2, c. 18, § 342. Wheaton, p. 509.

<sup>2</sup> *Ib.*, p. 506.

<sup>3</sup> War is defined by Grotius to be ‘The state or condition of the parties contending by force of arms’—‘*Status per vim certantium quod tales sunt* ;’ by Bynkershoek, ‘A contention by way of force or deceit, of independent parties in the prosecution of their right’—‘*Bellum est eorum qui suæ potestatis sunt, juris sui persequendi ergo, concertatio per vim vel dolum* ;’ by Lord Bacon, as ‘The highest trial of Right when Princes and States, that acknowledge no superior upon earth, shall put themselves upon the justice of God for the deciding of their controversies by such success as it shall please Him to give on either side.’

resisting its authority. The general usage of nations, however, regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.<sup>1</sup>

**Persons.**—Assuming the contending parties to be sovereign persons or powers,—for with civil war we are not now concerned,—and assuming, as we are bound to assume, that each has exhausted every means consistent with his notion of justice to avoid war, the two stand before us in this simple position,—the one has taken up arms as his sole means of enforcing his claim, and is said to be on the *offensive*; the other has taken up arms to resist that claim, and is said to be on the *defensive*.

If we again recal our illustration of the ships, and add, on our mental canvas, to the two already there, and which we may now designate the *belligerents*, several other vessels, we have before us all the elements necessary to answer the question, To what rights does the war between the two give rise? *First*, Each of the newly introduced vessels has the right to take the part of either combatant; by doing so, he becomes his *ally*. *Secondly*, Each has the right to stand aloof, to refuse to take any part in the matter, or, in other words, to be *neutral*. The whole of the vessels are thus divisible into three classes,—Belligerent A standing alone, or identified with his allies; Belligerent B also alone, or with allies; the remainder, those represented by C, are neutrals. What, then, are the rights—1, of A as against B, and *vice versa*? and 2, of A and B as against C, and *vice versa*? Or what are the rights—1, of Belligerents as against each other? 2, What are

<sup>1</sup> Wheaton, p. 520.

the rights of Belligerents as against Neutrals, and *vice versa*?

By the statement of the case in this way, it would appear that, in one sense, third persons are as much parties to every war as are the original belligerents; that is to say, they have an election, they are free to become allies or neutrals; but having made their election, they are bound to maintain in its integrity the character adopted.

As to each belligerent, it appears, on the one hand, to be his natural right, by every means in his power, to enforce his claims against his adversary, to oppress him to the uttermost, even to destroy him. And supposing the belligerents to be individual sovereign persons, the proposition would not admit either of qualification or exception. This question therefore arises: Does the fact of each belligerent being a nation in any way alter the case? Here a difficulty presents itself. To realise this point, we must distinguish accurately between two totally different conditions of things: *first*, a fraternity of independent sovereignties that have no commercial intercourse with each other, even when on the most friendly relations; and *second*, the same fraternity of independent sovereignties having by common consent sanctioned, encouraged, and established the most perfect commercial relations between their respective subjects. In the first instance, the fact of the sovereign being one or a million persons could, it may be said, and perhaps correctly, make no difference. But can that be said of the second position? The belligerents, prior to their quarrel, were parties to the bringing into existence of a peculiar state of things, upon the faith of

which all the neutrals have materially modified their normal condition. We may go further and say, they have inaugurated a condition which renders the uninterrupted continuance of these commercial relations an absolute necessity. Does, then, the *natural* right to attempt to enforce a claim by arms annihilate the *conventional* right in the neutral to the enjoyment of his right of free commerce with the subjects of either or both belligerents?

It may be said that these neutral rights were from the beginning *contingent* upon the continuance of peace between all parties. Unsatisfactory as this answer may seem, it is upon that hypothesis—at least so it would appear—that the whole doctrine of *International Neutrality* rests; and to the fact of its questionable soundness we may ascribe the various modifications of neutrality law in favour of the merchant, which have from time to time been made, and that so steadily in one direction, as to point to a time when the recognition of the neutral's right will reduce war to mere duelling between armies in the field; in which condition it may possibly appear so repugnant to the intelligence of enlightened nations as to induce the substitution of a code of International Law, and the settlement of all national differences by arbitration.

‘One of the immediate consequences,’ says Wheaton, ‘of the commencement of hostilities, is the interdiction of all commercial intercourse between the subjects of the States at war without the license of their respective governments. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war as to commerce.’<sup>1</sup>

<sup>1</sup> International Law, p. 544.

These few remarks are placed by way of preface to the remaining observations on International Law, with the view of impressing upon the reader the fact that several of the rights about to be noticed are in a transition state, and consequently in some cases not easily susceptible of clear elementary definition.

**Commencement of War and its immediate Effects—The Belligerents.**—The practice of making a formal declaration of war has ceased since the middle of the 17th century. The latest example was the declaration by France against Spain, at Brussels, in 1685, by heralds-at-arms, according to the form observed during the Middle Ages. The present usage is to publish a manifesto within the territory of the State declaring war, announcing the existence of hostilities, and the motives for commencing them.

A *perfect* war is where one entire nation is at war with another nation, and all the members of each nation are authorised to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An *imperfect* war is limited to places, persons, and things.<sup>1</sup>

The regularly commissioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, though without express authority for that purpose, are alone authorised to engage in hostilities against the enemy. The immediate effect of a declaration of war is that it gives the belligerent the right to use every means necessary to accomplish the end for which he has taken up arms. Bynker-

<sup>1</sup> Wheaton, p. 518.

shoek and Wolf assert that everything done against an enemy is lawful. Wheaton, however, says that no use of force is lawful, except so far as it is necessary. A belligerent has therefore no right to take the lives of those subjects of the enemy whom he can subdue by any other means.<sup>1</sup>

The custom of civilised nations has exempted the persons of the sovereign and his family, the members of the civil government, and generally all other persons, public or private, from the direct effects of military operations, unless actually taken in arms, or found guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.<sup>2</sup> Grotius has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And Bynkershoek who holds that every sort of fraud may be practised towards him, prohibits perfidy, saying, 'I allow of any kind of deceit, perfidy alone excepted, not because anything is unlawful against an enemy, but because, when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy.'<sup>3</sup>

**Ransom.**—The belligerent right to destroy the captive enemy has even from the earliest ages, isolated cases excepted, been exercised in some modified form; *e.g.*, the reduction of the captive to the condition of slavery; his release for a pecuniary payment called a *ransom*; or the exchange of prisoners, the exchange being in fact but a form of ransom. The agreements of modern times for exchange or ransom are termed

<sup>1</sup> Wheaton, p. 588.

<sup>2</sup> *Ib.*, p. 594.

<sup>3</sup> *Quæst. Jur. Pub. lib. i. cap. 1.*

*cartels*, and the vessels employed in the transport of surrendered prisoners, as well as, when occasion requires it, negotiations for the stay or suspension of hostilities, are styled *cartel-ships*. In general, when a ship is going on a cartel, unless there has been a stipulation as to the character of the ships to be so employed, it is immaterial whether she is a merchant ship or a ship of war; but a cartel ship has no right to trade by carrying either merchandise or passengers for hire. It need hardly be stated that exchange is the rule of modern warfare among Christians, or that the character of a cartel-ship is held to be sacred. The *white flag* that disarms the foe pledges the *bona fides* of its bearer.

**Neutrals.**—Modern International Law recognises two species of neutrality—1, natural or perfect neutrality; 2, imperfect, qualified, or conventional neutrality.

**Natural, or Perfect Neutrality**, is that which every sovereign State has a right, independently of positive compact, to observe, in respect to the wars in which other States may be engaged.<sup>1</sup> With the disputes between others the neutral has nothing whatever to do. It is not for him to determine the merits of the quarrel, the justice or injustice of the cause of either. He must, as a neutral, be strictly impartial.

**Imperfect Neutrality.**—Imperfect, qualified or conventional neutrality is that neutrality which is modified by special compacts. Neutrality may be modified by antecedent engagements, by which the neutral is bound to one of the parties to the war. Thus a neutral may be bound by treaty, previous to the war, to furnish

<sup>1</sup> Wheaton, p. 697.

one of the belligerent parties with a limited succour, in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally with his prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.<sup>1</sup> Bynkershoek states it to be the duty of neutrals to be every way careful not to interfere in the war, and to do equal and exact justice to both parties.<sup>2</sup> Vattel says, the impartiality which a neutral nation ought to observe between belligerents is twofold—first, to give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. Secondly, in whatever does not relate to the war, the neutral must not refuse to either of the parties, merely because he is at war with the other, what she grants to that other.<sup>3</sup>

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows that hostilities cannot lawfully be exercised *within the territorial jurisdiction of the neutral State*, the

<sup>1</sup> Wheaton, p. 710.

<sup>2</sup> 'Horum officium est, omni modo cavere, ne se bello interponant, et his, quam illis partibus sint vel æquiores vel iniquiores. . . . Bello se non interponant, hoc est, in causa belli alterum alteri ne præferant, et eo solo recte defunguntur, qui neutrarum partium sunt. . . . Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum, ejus non est, inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causa æquiore vel iniquiore huic illi plus minusve tribuere vel negare. Si medius sim, alteri non possum prodesse ut alteri noceam.'—Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

<sup>3</sup> Droit des Gens, liv. iii. chap. 7, § 104.

common friend of both parties.<sup>1</sup> Not only are all captures made by the belligerent cruisers within the limits of such jurisdiction absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbour of a neutral State, for the purpose of exercising the rights of war from that station, are also invalid.<sup>2</sup> So where a belligerent ship, lying within neutral territory, made a capture, with her boats, out of the neutral territory, the capture was held to be invalid, for no such use of the neutral territory for the purposes of war is to be permitted.<sup>3</sup> This prohibition is not, however, to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates; but no *proximate* acts of war are in any manner to be allowed to originate on neutral ground.<sup>4</sup>

As it is the neutral State alone which is injured by a capture made within its territory or jurisdiction, it is a technical rule of Prize Courts to restore to the individual claimants, in such case, only on the application of the neutral government whose territory has been violated.<sup>5</sup> So, where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the old-established right, as well as the duty, of the neutral State, when the property thus taken comes into its possession, to restore it to the original owners.<sup>6</sup> If, however, the neutral vessel thus recaptured was laden with contraband<sup>7</sup> goods

<sup>1</sup> Wheaton, p. 713.

<sup>2</sup> *Ib.*, p. 715.

<sup>3</sup> *The Anna*, 5 Robinson's Adm. Rep., p. 385*e*.

<sup>4</sup> Wheaton, p. 720.

<sup>5</sup> 'Case of the *Etrusco*,' 3 Robinson's Adm. Rep. p. 162, note.

<sup>6</sup> See Wynne's Life and Works of Sir L. Jenkins, vol. ii. p. 727. Wheaton, p. 722.

<sup>7</sup> See Contraband, p. 327.

destined to an enemy of the first captor, it may, perhaps, be doubted whether they should be restored, inasmuch as they were liable to be confiscated as prize of war to the first captor.<sup>1</sup> It is hardly necessary to state that the privilege of immunity conceded to allied or neutral vessels is forfeited by the committal of acts inconsistent with the character of ally or neutral.

Bynkershoek says—‘It is lawful to detain<sup>2</sup> a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral.’<sup>3</sup>

The right of the belligerents to the strict neutrality of those who elect that character, must of necessity exist against the sovereign of the neutral State. It is therefore his duty to adopt all necessary measures to prevent his subjects violating that right. Nor can the sovereign shelter himself under any plea of inability to control the acts of his subjects, for such a plea is inconsistent with the very notion of sovereignty. The measures adopted by our Government to prevent the violation of neutrality by British subjects are set forth in what is termed the Foreign Enlistment Act.

**The Foreign Enlistment Act<sup>4</sup> 1870 (33 & 34 Vic. ch. 90)** declares:—

Sec. 4. ‘If any person, without the license of Her

<sup>1</sup> Wheaton, p. 649.

<sup>2</sup> See ‘Search,’ p. 331.

<sup>3</sup> Quæst. Jur. Pub. lib. i. cap. 14.

<sup>4</sup> The remaining sections of this Act provide as to:—1. Title. 2. Application of Act. 3. Commencement of Act. 5. Penalty on leaving Her Majesty’s dominions with intent to serve a foreign state. 6. Penalty on embarking persons under false representations as to service. 7. Penalty on taking illegally enlisted persons on board ship. 9. Presumption as to evidence in case of illegal ship. 11. Penalty on fitting out naval or military expeditions without license.

Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid—

‘He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.’

Sec. 8. ‘If any person within Her Majesty's dominions, without the license of her Majesty, does any of the following acts: that is to say—

‘(1.) Builds or agrees to build, or causes to be built any ship, with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed

13. Limitation of term of imprisonment. 14. Illegal prize brought into British ports. 15. License by Her Majesty how granted. 16. Jurisdiction in respect of offences by persons against Act. 17. Venue in ditto. (24 & 25 Vic. c. 97.) 18. Power to remove offenders for trial. 19. Jurisdiction in respect of forfeiture of ships for offences against Act. 20. Regulations as to proceedings against the offender and against the ship. 21. Officers authorised to seize offending ships. 22. Powers of officers authorised to seize ship. 23. Special power of Secretary of State or chief executive authority to detain ship. 24. Special power of local authority to detain ship. 25. Power of Secretary of State or executive authority to grant search warrant. 26. Exercise of powers of Secretary of State or chief executive authority. 27. Appeal from Court of Admiralty. 28. Indemnity to officers. 29. Indemnity to Secretary of State or chief executive authority. 30. Interpretation clause. 31. Repeal of 59 Geo. III., c. 69. 32. Saving as to commissioned foreign ships. 33. Penalties not to extend to persons entering into military service in Asia. (59 Geo. III., c. 69, § 12.)

in the military or naval service of any foreign State at war with any friendly State : or

‘ (2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State : or

‘ (3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State : or

‘ (4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State :

‘ Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue :

‘ (1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour :

‘ (2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty :

‘ Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect

of such building or equipping, if he satisfies the conditions following ; (that is to say,)

‘(1.) If forthwith, upon a proclamation of neutrality being issued by Her Majesty, he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State :

‘(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.’

Sec. 10. ‘If any person within the dominions of Her Majesty, and without the license of Her Majesty—

‘By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which, at the time of her being within the dominions of Her Majesty, was a ship in the military or naval service of any foreign State at war with any friendly State—

‘Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.’

Sec. 12. ‘Any person who aids, abets, counsels, or

procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.'

**Property.**—The custom of civilised nations in addition to the *persons* already mentioned (p. 306), has in the case of *property* likewise limited and restrained the operations of war against the territory and other property of the enemy. 'By the modern usage of nations,' says Wheaton, 'which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. As, however, if deemed necessary, in order to accomplish the ends of the war, to ravage or lay waste the enemy's country is still held to be *lawful*, we must consider the legal effect of war upon property more in detail. War gives the right to confiscate, but does not of itself confiscate the property of the enemy.<sup>2</sup> It gives an equal right over persons and property. According to the modern rule, neither the property of the enemy within the belligerent state, nor the debts due to his subjects, are confiscated on the breaking out of war, though the right to enforce payment of debts may be suspended till peace is declared.<sup>3</sup> The title to property lawfully taken in war may, upon general

<sup>1</sup> Wheaton, p. 596.

<sup>2</sup> *Ib.*, p. 538.

<sup>3</sup> *Ib.*, p. 529.

principles, be considered as immediately divested from the original owner and transferred to the captor. This general principle is however modified by the positive law of nations, in its application both to real and personal property, or moveables. The title is, in general, considered as lost<sup>1</sup> to the former proprietors as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried into a place of safety, *infra præsidia*, by the captor.<sup>2</sup>

**Territory.**—The acquisition of *territory* as a result of war is considered incomplete, till a treaty of peace has recognised and ratified the possession of the conqueror. Until such confirmation, it continues liable to be divested by the *jus postliminii*.<sup>3</sup> Consequently, the purchaser of any portion of the territory from the conqueror would be liable to eviction without recompense by the original sovereign owner upon his restoration.

**Real Property**, that is *private* immoveable property is, by the general usage of modern nations, exempt from confiscation.<sup>4</sup>

**Enemy's Property in Neutral Territory.**—Property of the enemy locally situated within the jurisdiction of a neutral State is exempt from capture. This exemption springs from the right of the neutral State, not from any privilege which the situation gives the hostile owner.<sup>5</sup>

<sup>1</sup> See Postliminium, p. 325, note.

<sup>2</sup> Wheaton, p. 629.

<sup>3</sup> The right of *Postliminy* is that by virtue of which persons and things taken by an enemy in war are restored to their former state, upon coming again under the power of the nation to which they belonged prior to the war.

<sup>4</sup> Wheaton, p. 683.

<sup>5</sup> *Ib.*, p. 527.

The produce of an enemy's colony, or other territory, is considered as hostile property, so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever his place of residence.

**Personalty—Moveables.** — All moveable property found upon the enemy's territory belonging to enemy-subjects is *booty of war*, and passes with the conquered territory to the captor. *Parta bello cedunt reipublicæ*. 'As the towns and lands taken from the enemy,' says Vattel, 'are called *conquests*, all moveable property taken from the enemy comes under the designation of *booty*. This *booty*, equally with the *conquests*, naturally belongs to the Sovereign making war, for he alone has such claims against the hostile nation, as warrant him in seizing and converting its property to his own use. His soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right.'<sup>1</sup> The extent to which this right is exercised necessarily depends upon the humanity of the conqueror. We have already (p. 306) given Wheaton's view of the present law upon this subject.<sup>2</sup>

'It is very clear,' observes Mr. Justice Story,<sup>3</sup> 'that in general the national character of a person is to be decided by that of his domicile; if that be neutral, he acquires the neutral character; if otherwise, he is affected by the enemy's character. But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. In other words, the origin of the property,

<sup>1</sup> *Droit des Gens*, liv. iii. c. 9, § 164.

<sup>2</sup> See Twiss, *Law of Nations—War*, p. 123, *et seq.*

<sup>3</sup> *San Jose Indiano and Cargo*, 2 Gallison, p. 285.

or the traffic in which it is engaged, may stamp it with a hostile character, although the owner may happen to be a neutral domiciled in a neutral country. Such are the familiar instances of engagements in the colonial, coasting, fishing, or other privileged trade of the enemy. So, the produce of an estate belonging to a neutral in an enemy's colony is impressed with the character of the soil, notwithstanding a neutral residence. So, if a vessel purchased in the enemy's country is, by consent and habitual occupation, employed in the trade of that country during the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicile of the owner.' 'The principle, says Sir Travers Twiss, 'to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages as native resident subjects, his property *so employed* is to be deemed incorporated with the general commerce of that country, and subject to confiscation, be his residence where it may.'<sup>1</sup>

**Property Afloat.**—The property, whether public or private, of the enemy afloat, whether at sea or in port, is liable to capture and confiscation.

**Ransom at Sea.**—The position of a captor afloat is obviously, in many respects, very different from that of the captor on land; conspicuously so in the fact that his prize must in many instances prove so serious a burthen as to prompt the expediency of resorting to his right instantly to destroy it. This right, coupled with this difficulty, suggested the expedient of *Ransom*

<sup>1</sup> Law of Nations—War, p. 307, where see cases quoted.

*Bills*, or contracts entered into between the captor and the commander of the captured vessel, by which the former, for a sum agreed between them, releases and gives him safe-conduct within a given period to a given port. Mr. Justice Story remarks,—‘Whether the property vests after twenty-four hours’ possession, or after bringing *infra præsidia*, as seems the doctrine of the civilians; or after condemnation, as is the doctrine of Great Britain; it is clear that the right to take a *Ransom* exists from the moment of capture; but by the general practice of the maritime world, a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors—at least, in respect to the Sovereign and subjects of their own country. Nor is a Ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. In this respect there seems to be no legal difference between the case of a ransom of the property of an enemy and of a neutral. For if the property be neutral, and yet there be a probable cause of capture, or if the delinquency be such that the penalty of confiscation might be justly applied; there can be no intrinsic difficulty in supporting a contract, by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid, or agreed to be paid, by the captured.’<sup>1</sup>

Ransom Bills have received different countenance by

<sup>1</sup> *Maissenaire and others v. Keating*, 2 Gallison, p. 337.

different governments. By the British they have, since the 22 Geo. III. c. 25 (1782), been altogether discountenanced. That Act declares that 'if any person or persons shall, after the 1st of June, 1872, ransom, or enter into any contract or agreement for ransoming, any such ship or vessel, or any merchandise or goods on board the same, every person so offending shall, for every such offence, forfeit and lose the sum of five hundred pounds.' Ransoms have never been prohibited by the United States; by the French they have.<sup>1</sup>

Ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to be of the character with which they are so invested, to the exclusion of any claim of interest which persons resident in neutral countries may actually have in them.<sup>2</sup> As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those applicable to other personal property. These rules depend upon the nature of the different classes of cases to which they are applied. Thus the re-capture may be made either from a pirate; from a captor clothed with a lawful commission, but not an enemy; or lastly, from an enemy.

In a report made to George II., in 1753, by Sir George Lee, Dr. Paul, Sir Dudley Ryder, and Mr. Murray (afterwards Lord Mansfield), we find the following statement as to the maritime rights of belligerents:—

'When two nations are at war, they have a right to make prizes of the ships, goods, and effects of each other on the high seas. Whatever is the property of the

<sup>1</sup> See Twiss, *Law of Nations—War*, pp. 355, 363.

<sup>2</sup> Wheaton, p. 581.

enemy may be acquired by capture at sea ; but the property of a friend cannot be taken, provided he observes his neutrality.

‘ Hence the Law of Nations has established :

‘ (1.) That the goods of an enemy on board the ship of a friend may be taken.

‘ (2.) That the lawful goods of a friend on board the ship of an enemy ought to be restored.

‘ (3.) That contraband goods<sup>1</sup> going to the enemy, though the property of a friend, may be taken as prize ; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.”

We may add, that by the declaration of 16th April, 1856, the Congress of Paris, held after the Crimean war, adopted four principles of International Law :—1. Privateering is to remain abolished. 2. The neutral flag covers the enemy’s merchandise, with the exception of contraband of war. 3. Neutral merchandise with the exception of contraband of war, is not liable to seizure under an enemy’s flag. 4. Blockades, in order to be binding, must be effective—that is to say, they must be maintained by a force really sufficient to prevent approach to an enemy’s coast. This declaration was signed by the plenipotentiaries of the seven powers who attended the Congress, and it was accepted by nearly all the States of the world. But the United States of America, Spain, and Mexico refused their assent, because they objected to the abolition of privateering. Therefore the employment of private cruisers commissioned by the State still remains a perfectly legitimate mode of warfare. Great Britain and the other powers that acceded to

<sup>1</sup> See Contraband of War, p. 327.

<sup>2</sup> *Collectanea Juridica*, vol. i. p. 134.

the Declaration, are bound to discontinue the practice in hostilities with each other. But if we should have the misfortune to go to war with the United States, we should not be bound to abstain from privateering, unless the United States should enter into a similar and corresponding engagement with us.

As to the other three articles in the Declaration of Paris, the only new point conceded by Great Britain was that the neutral flag covers the enemy's goods, except contraband.<sup>1</sup>

**Recapture.**—Assuming one of the belligerents to have made a capture of a vessel, whether public or private, belonging to the other belligerent, it is clearly the right of the despoiled nation, either by its public or private vessels, to recapture if possible. We have therefore to inquire what, in the event of a recapture, is its effect:—1, supposing the vessel to be *public*; 2, *private*; and 3, does the length of time during which the prize was in the enemy's possession, or does any other circumstance, affect the act of recapture?

The fundamental principle upon this point is, that property captured by the enemy, and recaptured by the fellow-subjects or allies of the original owner, does not become the property of the recaptor, as if it had been a new *booty* or *prize*. It must be restored, *jure post-liminii*,<sup>2</sup> upon certain conditions,<sup>3</sup> to the original owner.<sup>4</sup>

It is the duty of every citizen to assist his fellow-citizens in war, and to retake their property out of the possession of the enemy. No *commission* is necessary

<sup>1</sup> Lord Mackenzie, p. 64.

<sup>2</sup> See pp. 315 (note), 325 (note).

<sup>3</sup> These conditions are regulated by the Municipal Law of the recaptor, and differ in different countries. See Phillimore, vol. iii. pp. 502—532.

<sup>4</sup> Phillimore, Internat. Law, vol. iii. p. 503.

to give a person so employed a title to the reward which the law allots to that meritorious act of duty.<sup>1</sup> But a mere rescue of a ship engaged in the same common enterprise gives no right to the reward styled *salvage*.<sup>2</sup>

**Salvage—*Servitium*.**—To encourage enterprise and reward success in this perilous undertaking, it is deemed but just to give the recaptor some pecuniary reward for his successful exertions. This recompense, termed *military salvage*,<sup>3</sup> as distinguished from *civil salvage*—the reward given to those who rescue a vessel or cargo from loss, other than capture by an enemy—is regulated

<sup>1</sup> The *Helen*, 3 Rob. p. 226.

<sup>2</sup> The *Belle*, 1 Edward's Adm. Rep., p. 66.

<sup>3</sup> '*Salvage*, allowance or compensation made to those by whose exertions ships or goods have been saved from the dangers of the seas, fire, pirates, or enemies. This was allowed by the laws of Rhodes, Oleron, and Wisby, and is by all modern maritime States. At Common Law the person who saves goods from loss or imminent peril, has a *lien* upon them, and may retain them till payment of salvage. If the salvage be performed at sea, or within high or low water mark, the Court of Admiralty has jurisdiction, and fixes the sum to be paid, adjusts the proportions, and takes care of the property pending the suit; or, if necessary, directs a sale, and divides the proceeds between the salvors and the proprietors. In fixing the rate of salvage, the Court has regard not only to the labour and peril of the salvors, but also to the situation in which they stand to the property saved, to the promptitude and alacrity manifested by them, and the value of the ship and cargo, and the danger from which they were rescued. In some cases, as much as half of the property saved has been allowed as salvage; in others only a tenth.

'The crew of a ship are not entitled to salvage or any unusual remuneration for extraordinary efforts made by them in saving her, it being their duty as well as interest to contribute their utmost upon such occasions, the whole of their possible service being pledged to the master and owners. Neither are passengers entitled to anything for the *ordinary* assistance they may have afforded a vessel in distress. But a passenger is not bound to remain on board a ship in danger, if he can leave her; and if he performs any *extraordinary* service he is entitled to a proportionable recompense.' Wharton's Law Lexicon; see 17 & 18 Vic. c. 18; also 17 & 18 Vic. c. 104, §§ 548—470, 484—498, and 18 & 19 Vic. c. 91 §§ 19, 20; and as to salvage in the Cinque Ports, see 1 & 2 Geo. IV., c. 76, §§ 1—5, 15—18; 17 & 18 Vic. c. 104, § 460; and 17 & 18 Vic. c. 120, schedule.

by the value of the ship or cargo, and is paid by the owner of the property thus rescued. The rate of salvage is either ascertained by positive law, or is left to the discretion of the Court. The Court may award both military and civil salvage to the same person when the facts of the case warrant it.<sup>1</sup> The present British law of military salvage was established by the statutes of the 43 Geo. III. c. 160, and 45 Geo. III. c. 72, which provides (sec. 7) that any vessel, or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners upon payment for salvage of *one-eighth* part of the value thereof, *if retaken by His Majesty's ships*; and if retaken *by any privateer*, or other ship or vessel under His Majesty's protection, of *one-sixth* part of such value. And if the same shall have been retaken by the joint operation of His Majesty's ships and privateers, then the proper Court shall order such salvage to be paid as shall be deemed fit and reasonable. But if the vessel so retaken shall appear *to have been set forth*<sup>2</sup> *by the enemy as a ship of war*, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors. A Prize Act is however passed at the beginning of every war.<sup>3</sup>

<sup>1</sup> Wheaton, p. 668.

<sup>2</sup> A vessel has been held *to be set forth as a vessel of war*, where, after the capture, she had been fitted out as a privateer, although when recaptured she was again navigating as a mere merchant ship, (*L'Actif, Edwards' A. R.*, p. 185);—so, where it appeared that the vessel had been engaged in the military service of the enemy under the direction of the commander of a single ship, (*The Georgiana*, 1 *Dodson's A. R.*, p. 397);—so, where the vessel was armed, and employed in the public military service of the enemy by those who had *competent authority* so to employ it, although it was not regularly commissioned, (*The Ceylon*, 1 *Dodson's A. R.*, p. 105). See Wheaton, p. 663 *et seq.*

<sup>3</sup> See 17 Vic. c. 18, §§ 9, 10.

To entitle a party to salvage, as upon a recapture, there must have been an *actual or constructive* capture; for military salvage will not be allowed in any cases where the property has not been actually rescued from the enemy.<sup>1</sup> But it is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under the dominion of the enemy. If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of *civil*, and not of *military*, salvage. But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor.<sup>2</sup> If a convoying ship recaptures one of the convoy which has been previously captured by the enemy, the recaptors are entitled to salvage.<sup>3</sup>

In respect to recaptures of the ships and cargoes of *allies* or *co-belligerents* from the hands of the common enemy, the general rule is to apply the principle of *reciprocity*; and if they, under like circumstances, restore on salvage, or condemn generally, to deal out to them the same measure of reciprocal justice. If there should exist a country having no rule on the subject, then the recapturing country applies its own rule, as to its own subjects, to the case, and rests on the presumption that the same rule will be administered in the future practice of the other party.<sup>4</sup> The rule adopted by our own maritime law is to restore on salvage to allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of

<sup>1</sup> See Wheaton, p. 664 *et seq.* for cases quoted; and as to recaptors, see p. 677 *et seq.*

<sup>2</sup> Phillimore, vol. iii. p. 524, where see cases quoted.

<sup>3</sup> The *Wight*, 5 Robinson, Adm. Rep., p. 315.

<sup>4</sup> Phillimore, vol. iii. p. 523. The *Santa Cruz*, 1 Rob. p. 49.

Admiralty will determine their cases according to their own rule.<sup>1</sup> The same rule of reciprocity is adopted by America.<sup>2</sup>

**Capture as distinguished from Re-capture.—**

Having established—(1) That it is the duty of co-belligerents to rescue each other, when possible, without payment, from the enemy; (2) that it is their duty to rescue the property of their fellow citizens, and that of the subjects of their co-belligerents similarly situated, in which case they become entitled to the reward termed salvage; and that the right of salvage arises from the fact of the rescued property being, at the time of its rescue, *the property of a fellow citizen*,—we have to inquire by what, if any, fact, property captured by the enemy ceases to belong to the original owner, and, by becoming the property of the enemy, entitles the fellow-citizen of the original owner to regard his seizure of it as a capture, making it his *prize*, instead of a mere re-capture entitling him only to salvage. This question involves what is known as the doctrine of postliminy (*postliminium*).<sup>3</sup>

<sup>1</sup> Sir W. Scott, 'The Santa Cruz,' 1 Rob. A. R., pp. 58—63.

<sup>2</sup> Wheaton, p. 657.

<sup>3</sup> The *ius postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were held to be restored to their former state, when coming again under the power of the nation to which they formerly belonged.

Grotius attests, and his authority is supported by that of the Consolato del Mare, that by the ancient Maritime Law of Europe, if the thing captured were carried *infra præsidia* of the enemy, the *ius postliminii* was considered as forfeited, and the former owner was not entitled to restitution. (Wheaton, p. 653.) At a later period, possession by the enemy for a period of twenty-four hours, was considered sufficient to change the property. 'The rule,' says Sir Travers Twiss, 'that the continuous possession of a ship and cargo on the part of the enemy for twenty-four hours should debar the original owner of the *ius postliminii*—in other words, should deprive him of all right to reclaim possession of his former ship and cargo, on payment of military salvage to the recaptor—or, as Bynkershoek terms it, *salvo servatio*, seems to have been borrowed from the Laws of the Lombards.' (Law of Nations—War, p. 342.)

To work this change in the character of a ship and cargo, 'the Law of Nations now requires,' says Lord Stowell, 'a sentence of condemnation in a competent court decreeing the capture to have been rightly made *jure belli*: it not being thought fit in civilized society, that property of this sort should be converted without the sentence of a competent court, pronouncing it to have been seized as the property of an enemy, and to be now become, *jure belli*, the property of the captor. The purposes of justice require that such exercises of war shall be placed under public inspection, and therefore the mere *deductio infra præsidia* has not been deemed sufficient.'<sup>1</sup> Till, therefore, a vessel and her cargo, taken by the enemy, have been condemned by the enemy's properly constituted prize tribunal to be a lawful prize, its recapture only entitles the recaptor to salvage. After such condemnation, however, the recapture would be in fact a capture, and, as such, would entitle the captor, not to *salvage*, but to the whole or his share as *prize of war*.

**Private Contracts with Enemy.**—A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse; therefore every species of private contract made with the enemy, or his subjects, during the war, is unlawful.<sup>2</sup> When one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent States shall do anything to defeat the common object.

**Neutral's Property.**—Having considered the effect of war upon the property, real and personal, of the belli-

<sup>1</sup> See Twiss, *Law of Nations—War*, p. 348.

<sup>2</sup> Wheaton, p. 556.

gerents, and having shown that neutrals are in one sense parties to every war, we now come to enquire whether the property of a neutral is in any, and if in any, in what way, affected by the war. As to the territory and realty of the neutral, sufficient has already been said to explain their position. Our attention will therefore be confined to neutral personalty, and may be limited to neutral personalty afloat. It is said, on the one hand, that the existence of the war does not extinguish the right of the neutral to enjoy his commercial relations with either or both belligerents. It is held, on the other hand, that it is his duty to act with strict impartiality between the combatants, and that this impartiality precludes him from rendering belligerent succour to either. These two propositions appear irreconcilable; for (1) it is impossible at the same time to exercise the right of commerce, and not to succour the belligerents; and (2) impartiality would necessarily admit the free sale even of the implements of war to each. Such being the case, we seek in vain for a definite principle by which to determine the limit to the commerce permitted by the Law of Nations to the neutral with either belligerent. Traffic, however, in certain things, known by the term *contraband of war*, has, by common consent, been prohibited to the neutral.

**Contraband of War.**<sup>1</sup> — 'The articles usually included,' says Professor Leone Levi, 'as contraband of war are cannons, mortars, fire-arms, pistols, bombs, grenades,

<sup>1</sup> Grotius distinguishes between, 1st, things which are useful only for the purposes of war; 2nd, those which are not so; and 3rd, those which are susceptible of indiscriminate use in war and peace, *e.g.*, money, provisions, ships, and naval stores. Vattel includes timber and naval stores in the first division. Bynkershoek strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and war. Valin and Pothier both concur in declaring that provisions (*munitions de*

bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, and cartouche boxes. These articles are of a direct and immediate use in war, and are exclusively used for war purposes. But many articles commonly used in time of peace may, under certain circumstances, be held to be contraband. Horses have been considered as liable to capture; so naval stores, and even pitch and tar, though a relaxation has been made in favour of Sweden and other countries where such articles constitute the special produce of the claimant's country. Raw materials are less objectionable than manufactured goods; hemp is more favourably considered than cordage, and iron than anchors and other instruments made out of it. As regards coal, the destination may determine whether it is contraband or not. If sent to ports where steam vessels are ordinarily calling to load, it would be only an article of commerce; but if sent to arsenals or great naval ports, it might be held to be contraband. The catalogue of contraband goods has undergone many variations from time to time; but now a general agreement exists among all nations.<sup>1</sup> It is not easy to see wherein the difference *in principle* exists between British ship-building and Swedish pitch and tar manufactures. However, the *line of demarcation* is sufficiently obvious. The transport of those things held to be *contraband of war* by a neutral subject to either belli-

*bouche*) are not contraband by the Prize Law of France, or by the Common Law of Nations, unless in the single case where they are destined to a besieged or blockaded place. (Wheaton, pp. 772—781).

Since the beginning of the present century, naval stores have generally been regarded as contraband. Sir W. Scott (Lord Stowell) declared tar, pitch, and hemp going to the enemy's use, liable to be seized as contraband in their own nature. (*The Maria*, 1 Rob. A. R., p. 372.)

<sup>1</sup> International Commercial Law. Introduction, p. 46.

gerent, simply works a forfeiture of those things when captured by the opposite belligerent, whereas a neutral sovereign suffering *military persons* or *vessels of war* to leave his territory for the purpose of aiding one belligerent, gives to the other belligerent a just cause of war.

Assuming the articles specified to be singled out from all others, and branded with a certain character, we enquire, In what does the violation by the neutral of the belligerent's rights respecting them consist? The answer is, It is not in possessing or manufacturing, as the case may be, those articles, nor is it in giving, lending, or selling them to a belligerent; the wrong is solely confined to the act of *carrying* them to the belligerent. This wrong is not considered to be a wrong committed by the Sovereign, consequently the penalty attached to the wrong does not fall upon the Sovereign, but upon the actual perpetrator of the wrong. Neutral Governments therefore merely warn their subjects of the danger attached to the traffic, and leave the subject free to engage in it at the risk of having his ships and cargoes captured.<sup>1</sup>

Of the same nature with the carrying of contraband goods is the transport of military persons or dispatches in the service of the enemy. A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation if captured by the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service exempt her. It is however difficult to define the number of military persons necessary to subject a vessel to confiscation; since fewer persons of high quality and

<sup>1</sup> See Levi's International Commercial Law, Introduction, p. 47, for authorities quoted in support of this proposition.

character may be of much more importance than a much larger number of persons of lower condition.<sup>1</sup> The fraudulent carrying of the despatches of the enemy also subjects the neutral vessel, in which they are transported, to capture and confiscation. But the carrying of the despatches of an ambassador or other public minister of the enemy, resident in a neutral country, is exempted.<sup>2</sup>

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier master refused the freight to which he is entitled upon innocent articles, or those condemned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty.<sup>3</sup> And even when the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo.<sup>4</sup>

The general rule as to contraband articles is laid down by Sir W. Scott, thus: 'Under the present understanding of the Law of Nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but, beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.'<sup>5</sup> But when false papers and false destina-

<sup>1</sup> Wheaton, p. 797.

<sup>4</sup> *Ib.*, p. 807.

<sup>2</sup> *Ib.*, p. 803.

<sup>5</sup> *The Imina*, 3 Rob. A. R., p. 168.

<sup>3</sup> *Ib.*, p. 806.

tions are resorted to in order to conceal the real object of the expedition, a return cargo, the proceeds of the outward cargo is liable to condemnation.<sup>1</sup>

As the question is, Has there been an injury arising to the belligerent from the employment in which the vessel is found? it is in the judgment of Prize Courts immaterial whether the master knew, or was ignorant of the character of the service on which he was engaged.<sup>2</sup>

**The Right of Visit and Search.**<sup>3</sup>—The right of the belligerent to seize and confiscate contraband of war, naturally carries with it the right to hunt for and find it, which right has brought in its wake the *right of visit and search*. 'The right of visiting and searching merchant ships upon the high seas,' says Professor Levi, 'whatever be the ships, whatever be the cargoes, whatever be the destination,—is a right of the lawfully commissioned cruisers of belligerent nations; for it does not appear what the ship, or the cargo, or the destination is, till she is visited and searched; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. The custom is, that when a cruiser meets a vessel, he fires a gun, which is a signal for the merchant vessel to stop and to submit to the search. If the vessel summoned does not stop, the belligerent cruiser has the right to pursue her and to force her. And should the master of such vessel resist the right, both the ship and all the property are at once subject to confiscation.

<sup>1</sup> Wheaton, p. 810.

<sup>2</sup> *Ib.*, p. 802.

<sup>3</sup> The right of visitation and search is an exclusively belligerent right. It does not exist in time of peace, unless expressly given by international compact. It is confined to the *private vessels* of the neutral, the entire immunity of *public vessels* from every species and purpose of search being generally conceded. (See Wheaton, p. 209 *et seq.*)

The cruising ship has a right to send on board the merchant ship for her papers; and if she be found to carry contraband goods, or military officers to any port of the enemy, the cruiser must bring the same before the Court of Prizes for a more deliberate enquiry than could be conducted at sea. The right of search is regulated by treaties, and by regulations issued by the belligerent powers.<sup>1</sup>

The right to search private vessels belonging to the subjects of a foreign nation on the high seas, for deserters and other persons liable to military and naval service, has been uniformly asserted by Great Britain, and equally denied by the United States.<sup>2</sup>

Sir W. Scott, in the case of the *Maria*,<sup>3</sup> lays down and argues the three following propositions—First, That the right of visiting and searching merchant ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. Second, That the authority of the neutral Sovereign being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser; and third, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. In the case of the *Catherina Elizabeth*,<sup>4</sup> he says,—‘If a *neutral* master attempts a rescue, he violates a duty which is imposed upon him by the law of nations, to submit to come in for enquiry as to the property of the ship or cargo; and if he violates

<sup>1</sup> International Commercial Law, Introduction, p. 48.

<sup>2</sup> Wheaton, p. 210.

<sup>3</sup> 1 Robinson's A. R., p. 359 *et seq.*

<sup>4</sup> 5 Rob. A. R., p. 232.

that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an *enemy* master, the case is very different; no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right so to do.’

In general, no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidei* neutral from the hands of the enemy of the captor, is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized.<sup>1</sup> To this general rule, however, an important exception has been made, in the case where the vessel or cargo recaptured was *practically liable* to be confiscated by the enemy.<sup>2</sup>

**Blockade.**—A blockade is the disposition of troops or armed vessels, so as to cut off all external communication with an enemy’s ports, fortress, city, &c. The term is now generally applied to the blockade of a port by armed vessels. By the Declaration of Paris (already cited, p. 320) the blockade, to be binding, must be effective; that is to say, must be maintained by a force sufficient really to prevent access to the coast of the enemy. Any attempt to convey persons or goods to or from the place blockaded is termed a *breach of blockade*, and subjects the offender to the confiscation of the

<sup>1</sup> Wheaton, p. 650.

<sup>2</sup> See, for examples, Wheaton, p. 651.

offending ship and property if seized by the blockading power.

Neutral vessels lying at the place when the blockade commences are at liberty to retire, taking with them the cargoes with which they may be already laden ; but they must not take in any new cargo after the notification of the blockade. Wheaton says,—‘ A neutral ship departing can take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade ; if she afterwards take on board a cargo, it is a violation of the blockade.’<sup>1</sup> A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same through the interior canal navigation or land carriage of the country, for the legal blockade can extend no further than the actual blockade can be applied. Sir W. Scott says,—‘ There are two sorts of blockade : one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases otherwise than by accident, or the shifting of the wind, there is immediately an end of the blockade. But where the fact is accompanied by a public notification from the government of a belligerent country, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed.’<sup>2</sup>

A breach of blockade subjects, as we have said, the vessel, and all the property on board it, to confiscation ; but as the master is only the agent of the owners of the ship, the cargo is restored, if it can be proved that the owners were not parties to the breach, and that, when the cargo was shipped, they were ignorant of the blockade. The ship which violates a blockade may be

<sup>1</sup> p. 842.

<sup>2</sup> The *Neptunus*, 1 Rob. A. R., p. 171.

confiscated on her return ; and if she be taken in any part of the voyage, she is taken *in delicto*, and is subject to confiscation.

In all cases, however, of breach of blockade, as of contraband of war, it is the duty of the cruiser to take the ship to a Court of Prizes for adjudication. Captors have the right to seize, but subject to the duty of bringing the vessel to adjudication.<sup>1</sup>

To constitute a violation of blockade three things must be proved:—1, the existence of an actual blockade; 2, the knowledge of the party supposed to have offended ; and 3, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade.<sup>2</sup> The existence of an actual blockade must be evidenced by the actual presence of a maritime force, stationed at the entrance of the port, sufficiently near to prevent communication. The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade.<sup>3</sup>

As a proclamation or general public notification is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party *merely* in consequence of such a proclamation or notification. Not only

<sup>1</sup> Levi, International Commercial Law, Introduction, p. 51, which see for cases in support of these propositions.

<sup>2</sup> Wheaton, p. 827.

<sup>3</sup> *Ib.*, p. 828.

must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.<sup>1</sup> In the case of a blockade *de facto* only, a neutral master may plead ignorance in fact; but in the case of a blockade by notification, he may not, for he is held to know what has been communicated to his Government.

The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than the end of the return voyage; although, if she is taken in any part of that voyage, she is taken *in delicto*. But when the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*.

**Safe-conduct.**—Safe-conducts, passports, and licenses are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on general principles. Grotius lays down the general rule, that safe-conducts, of which passports and licenses are species, are to be liberally construed,—*laxa quam stricta interpretatio admittenda est*. Of late, licenses have been interpreted with great liberality in the British Courts of Prize.<sup>2</sup>

**Truce, Armistice.**—A truce or armistice is a suspension of hostilities. It may be either general or special. It may amount, in effect, to a temporary peace, except that it leaves undecided the controversy in which the war originated. The conclusion of such a general truce requires either the previous special authority of the Supreme Power of the State, or a subsequent ratification of such power. A suspension of hostilities

<sup>1</sup> Wheaton, p. 832.

<sup>2</sup> *Ib.*, p. 691.

must be duly promulgated to have the force of legal obligation with regard to all the subjects of the belligerent States. As a truce merely suspends hostilities, without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice.<sup>1</sup>

Each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace ; *e.g.*, levy and march troops, collect provisions and munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged ; but neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice.<sup>2</sup> When a truce has been concluded for a definite period, hostilities recommence, as a matter of course, at the expiration of that period ; when for an indefinite or a very long period, notice of intention to resume hostilities should be given.

**Capitulation.**—Capitulation for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers intrusted to military and naval commanders. But if the commander of the fortified town undertakes to stipulate for the perpetual cession of that place, or enters into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere *sponsion*.

**Prize Courts.**—The validity of maritime captures

<sup>1</sup> Vattel, *Droit des Gens*, liv. 3, chap. xvi. §§ 245—251.

<sup>2</sup> Wheaton, p. 686.

must, as we have already seen, be determined in a court of the captor's government. This court may sit either in his own country or in that of an ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port. Where, however, the capture is made either within the territorial limits of a neutral State, or by armed vessels fitted out within the neutral territory, the judicial tribunals of the neutral State have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other States in amity with it, to the original owners.<sup>1</sup>

The jurisdiction of the Court of the capturing nation is conclusive upon the question of property in the captured thing. By the 3 & 4 Vic. c. 65, s. 22, it is enacted,—‘The High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning *Booty of War*, or the distribution thereof, which it shall please Her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said Court; and in all matters so referred the Court shall proceed as in cases of *prize of war*, and the judgment of the Court therein shall be binding on all parties concerned. An appeal lies from the Prize Court to the Queen in council.’<sup>2</sup>

‘Prize,’ says Sir W. Scott, ‘is altogether a creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown;’<sup>3</sup> beyond the extent of that gift he has nothing. This

<sup>1</sup> Wheaton, p. 669 *et seq.*

<sup>2</sup> See 27 & 28 Vic. cc. 24 & 25.

<sup>3</sup> See 2 Will. IV. c. 53; 27 & 28 Vic. cc. 23, 24, & 36.

is the principle of law upon the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown: and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our Constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject—*Bello parta cedunt reipublicae*.<sup>1</sup> Lord Brougham accordingly held, that up to the period of final adjudication the Crown can restore the prize, without thinking of consulting, or taking the consent of the captor, who at his peril, and at the expense of his own blood and treasure, won that prize from the enemy.<sup>2</sup>

Where the responsibility of the captor ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.<sup>3</sup> A judicial sentence, plainly against right, to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals. By the 33 & 34 Vic. c. 90, s. 14, it is enacted,—

‘If, during the continuance of any war in which Her Majesty may be neutral, any ships, goods, or merchandize, captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or

<sup>1</sup> The *Elsebe*, 5 Robinson's A. R., p. 182.

<sup>2</sup> See the Judgment of Lord Brougham in *Alexander v. the Duke of Wellington*, 2 Russell & Milne's Rep., p. 35.

<sup>3</sup> Wheaton, p. 673.

despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorised in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall, on due proof of the facts, order such prize to be restored.

‘Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime, and until a final order has been made on such application, the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.’

**Peace.**—The power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State. The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids

the revival of the same war by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it.<sup>1</sup>

The treaty of peace does not, however, extinguish claims founded upon debts contracted, or injuries inflicted, previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war.<sup>2</sup> The treaty of peace leaves everything in the state in which it found it, unless there is some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing is said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right,—and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever. The restoration of the conquered territory to its original sovereign, by the treaty of peace, necessarily carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state.<sup>3</sup> This general rule is applied without exception to real property or immoveables. In the case of personal property, however, a different rule applies. The title of the enemy to things of this description is considered complete against the original owner after

<sup>1</sup> Wheaton, p. 876.

<sup>2</sup> *Ib.* p. 877.

<sup>3</sup> *Ib.* p. 878.

twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires, as already stated, the formal sentence of condemnation, in order to preclude the right of the original owner to restitution on payment of salvage.<sup>1</sup>

A treaty of peace binds the contracting parties from the time of its signature. It binds the subjects of the belligerent nations from the time it is notified to them.

<sup>1</sup> Wheaton, p. 884.

## CHAPTER V.

ENGLISH MUNICIPAL LAW.—THE PUBLIC SUBSTANTIVE  
BRANCH.

THOUGH it is my duty in this work to confine myself strictly to the Public branch of English Municipal Law, and to the substantive portion of that branch, I have constructed three Tables, numbers V., VI., and VII., to illustrate this Chapter, in order that the reader may the more readily be able accurately to determine the relation of the public to the private, and of the substantive to the adjective, law of our land. Concerning Tables V. and VI., I shall have but little to say in this Chapter, and must leave the reader to interpret them for himself with the aid of what has been said in the Chapter on General Jurisprudence.

The Laws of England prevail in their entirety in the Kingdom of England, and the Principality of Wales alone. The *civil* division of England is into counties, subdivided into rapes, lathes, or trithings, which are again divided into hundreds or wapentakes and finally into towns, vills, or tithings. The territory of England is divided *ecclesiastically* into provinces, dioceses, archdeaconries, rural deaneries, and parishes.

The "Municipal Law of England," or the rule of

civil conduct prescribed to the inhabitants of this Kingdom, may with sufficient propriety be divided into two kinds—the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law.<sup>1</sup>

**The Sources of English Municipal Law** are two—*custom* and *legislation*. Those laws that had their origin in custom, or in statute anterior to the reign of Richard I., *i.e.*, before July 6, 1189, constitute what is termed the *Common Law* of England. The residue of our law, styled the *Statute Law*, or the *lex scripta*, had its origin in Statutes or Acts of Parliament subsequent to that date.

**Lex Scripta (Statute Law) and Lex non Scripta (Common Law) distinguished.**—The Laws of England, says Sir Matthew Hale,<sup>2</sup> may be divided into two kinds, *viz.*, the *lex scripta*, and the *lex non scripta*. The *lex scripta*, or written law, not unfrequently termed *Statute Law*, consists of Acts of Parliament, which in their original formation were reduced into writing, and are still preserved in their original form, and in the same style and words wherein they were first made. The *lex non scripta*, or unwritten law, includes not only general customs, or the *Common Law* properly so called, but even those more *particular* laws and customs applicable to certain courts and persons. 'And when I call those parts of our laws *leges non scriptæ*,<sup>3</sup> I do not mean as if those laws were only oral, or communicated from the former ages to the later merely by word; for all those laws have their

<sup>1</sup> Steph. Com. vol. i. p. 41.

<sup>2</sup> History of the Common Law of England, p. 1 *et seq.*

<sup>3</sup> See *post*, "Time within Memory," statutes *before*, p. 347.

several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty : for as the civil and canon laws have their *responsa prudentum consilia et decisiones*, i.e., their canons, decrees, and decretal determinations, extant in writing ; so those laws of England which are not comprised under the title of *Acts of Parliament*, are for the most part extant in records of pleas, proceedings, and judgments ; in books of reports, and judicial decisions ; in tractates of learned men's arguments and opinions, preserved from ancient times, and still extant in writing.

'But I therefore style those parts of the laws *leges non scriptæ*, because their authoritative and original institutions are not set down in writing in that manner or with that authority that Acts of Parliament are ; but they are grown into use, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, and by the strength of custom and reception in this Kingdom.'<sup>1</sup> *Ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.*<sup>2</sup>

Sir Matthew Hale divides the *leges non scriptæ* into —1, "The Common Law," as it is taken in its proper and usual acceptation ; 2, Those particular laws, applicable to particular subjects, matters, or courts. The former, he says, 'directs the course of descents of lands ; and the kinds, the natures, and the extents and qualifications of estates therein ; also, the manner, forms, ceremonies, and solemnities of transferring

<sup>1</sup> Hale, p. 21.

<sup>2</sup> Just. Inst. 1, 2. 9.

estates from one to another; the rules of settling, acquiring, and transferring of properties; the forms, solemnities, and obligation of contracts; the rules and directions for the exposition of wills, deeds, and acts of parliament; the process, proceedings, judgments, and executions of the King's ordinary Courts of Justice; the limits, bounds, and extents of courts, and their jurisdictions; the several kinds of temporal offences and punishments at Common Law, and the manner of the application of the several kinds of punishments, and infinite more particulars, which extend themselves as large as the many exigencies in the distribution of the King's ordinary justice requires.<sup>1</sup> Since Sir Matthew Hale's time, however, much that was then regulated by the Common Law is now controlled by Statute. The Common Law<sup>2</sup> cannot be authoritatively altered, except by Act of Parliament.

**Statute Law** (*Lex Scripta*).—We have no authentic records of any Acts of Parliament before 9 Hen. III.,<sup>3</sup>

<sup>1</sup> Hale, p. 22.

<sup>2</sup> The "Common Law" has been variously styled the *lex terre*, as in *Magna Charta*, cap. 29; *lex Angliæ*, as in the Statute of Merton, cap. 9; *lex et consuetudo regni*, as in commissions of Oyer and Terminer, and in the Statutes of 18 Edw. I. cap. , and *De Quo Warranto*; but most frequently it is called the *Common Law*, or the *Common Law of England*, as in the Statute of Articuli super Chartas, cap. 15, in the Statute 25 Edw. III., cap. 5, &c. (Hale, p. 52.) The term *Common Law* is said by some to have been employed to distinguish that body of laws so designated from—1, the Statute law; 2, particular customary laws; and 3, from the civil, canon, and military law, which are, in some particular cases and courts, admitted as the rule of their proceedings. (For Sir Matthew Hale's account of the origin of the expression *Common Law*, see Hale, pp. 53 and 54.)

<sup>3</sup> The former part of the history which goes under the name of Matthew Paris, to the year 1235, which gives an account of the *Magna Charta* and *Charta de Foresta*, is supposed to have been written by Roger Wendover; but it is generally referred to as the work of Matthew Paris, who died A.D. 1269. For a concise view and

and those we have of that King's time are but few. Nor have we any reports of judicial decisions, in any constant series of time, before the reign of Edward I.; though we have the *Plea Rolls* of the times of Henry III., and King John, in some remarkable order.<sup>1</sup>

Of the reign of Henry III. we have only one Summons of Parliament extant of record, viz. 49 Henry III., and we have but few of the many Acts of Parliament that passed in his time; viz., the *Great Charter*, and *Charta de Foresta*, in the ninth year of his reign; the *Statute*, or *Ordinance*, of *Merton*, in the twentieth year of his reign; the *Statute of Marlbridge*, or *Marlebridge*, in his fifty-second year; and the *Dictum sive Edictum de Kennelworth*, about the same time; and some few other old Acts.<sup>2</sup>

As to the Acts now extant of Edward I., and Sir Matthew Hale's comments upon them, see *ante*, page 122.

We have but few of the Acts of Parliament of the reign of Edward II. extant, especially of record.

From the accession, however, of Edward III. (1327), the 2nd, 3rd, 7th, 8th, and 9th years of his reign excepted, we have extant upon record, either in the *Parliament Rolls*, or in the *Statute Rolls* of that King and his successors, all the Acts of their respective reigns, and, for the most part, the petitions upon which the Acts were drawn up, or the very Acts themselves.<sup>3</sup>

character of most of our historians, either in print or MS., with an account of our records, law books, coins, &c., the English Historical Library, by Dr. Nicholson, may be referred to with confidence; and for the History of English Law generally, Reeve's History of the English Law, by Finlason.

<sup>1</sup> Hale, p. 83.

<sup>2</sup> *Ib.*, p. 9.

<sup>3</sup> *Ib.*, p. 8.

**Time within Memory.**—‘Statute Laws, or Acts of Parliament,’ says Sir Matthew Hale, ‘are of two kinds : (1) those statutes which were made before time of memory ; and (2) those statutes which were made within or since time of memory. According to a juridical account and legal signification, “ *time within memory* ” is the time of limitation in a Writ of Right ; which, by the *Statute of Westminster*, l. c. 39 (25th April, 1275), was settled and reduced to the beginning of the reign of King Richard I., or *ex prima coronatione regis Ricardi primi* ; who began his reign on July 6th, 1189, and was crowned September 3rd following. So that whatever was *before* that time, is before *time of memory*. What is *since* that time, is, in a legal sense, said to be *within*, or *since time of memory*. And therefore it is that those Statutes, or Acts of Parliament, that were made before the beginning of the reign of King Richard I., and have not since been repealed, or altered, either by contrary usage, or by subsequent Acts of Parliament, are now accounted part of the *lex non scripta* ; being, as it were, incorporated therein, and become a part of the Common Law. And in truth such statutes are not now pleadable as Acts of Parliament. Because what is *before time of memory*, is supposed without a beginning, or at least such a beginning as the law takes notice of. But they obtain their strength by mere immemorial usage or custom.’<sup>1</sup>

Those ancient Acts of Parliament, which are ranged under the head of *leges non scriptæ*, or customary laws, as being *before time of memory*, are to be considered under two periods,—1, Such as were made before the

<sup>1</sup> Hale, p. 3.

coming-in of William I.; 2, Such as intervened between his coming-in and the beginning of the reign of Richard I. The former are mentioned by our ancient historians, especially by Brompton; and are collected into one volume by William Lambard, in his *Tractatus de priscis Anglorum Legibus*; being a collection of the laws of the kings Ina, Alfred, Edward, Athelstane, Edmond, Edgar, Ethelred, Canutus, and of Edward the Confessor. Which last body of laws, compiled by Edward the Confessor, as they were more full and perfect than the rest, and better accommodated to the then state of things, so they were such whereof the English were always very zealous, as being the great rule and standard of their liberties.<sup>1</sup>

Sir Matthew Hale also divides the *leges scriptæ*, or Acts of Parliament subsequent to the accession of Richard I., into two classes, the *old statutes* and the *new*. The old statutes, extending from the accession of Richard I. to the accession of Edward III., or from 1189 to 1327; the new, from the latter date till the present time.

**The Subjects of Municipal Law** are *persons* and *property*. The word property is here used in preference to the term *things*, as designating those things only which have been reduced into possession either by the State as such, or by individual members of the State. All property may therefore be said to be either *public* or *private*. It is either *real* or *personal*.

<sup>1</sup> Hale, p. 5. The authenticity of these laws of Edward the Confessor is, however, controverted by Dr. Hicks. (Hic. Thes. Ling. Septen. Dissert. epist. 95.) A full account of the known Acts from the Accession of William I. to that of Richard I., is to be found in Selden's *Janus Anglorum*.

**Persons.**—When considering the State relatively to the individual members of the State, we are in fact considering a body relatively to its members. The mind will more readily seize the real question we have to discuss by adopting the simple illustration of an individual man. The man is the State, the members of the State are the various organs or members of his body. That the members exist solely by virtue of the existence of the body; that the body cannot exist without members; that some of the members are more important than others, *i. e.*, the vital than the non-vital; and that as to the non-vital there are also degrees of value, *viz.*, the hand over a single finger, is abundantly obvious; no less so is the fact that their *interest* is one, or the further fact that, while on the one hand it is consistent with the interest of the whole that an effort should be made by the whole to restore to health any individual member that may happen to be diseased, it is, on the other hand, imperative upon the whole to submit to the loss of that member whenever the reasonable hope of recovery has ceased, and danger to the whole is threatened. If this analogy is sound, what citizen who realises his true position as illustrated by it, be he the meanest member of the State, can fail to take a lively interest in the measures adopted to keep the body in a healthy condition? or, in other words, who, with correct notions upon the subject, can be indifferent to the study of the Public Municipal Law of his land? The analogy, however, between the natural body and its members, and the political body and its, fails in this one important particular. Whereas in the case of the natural body the hand must always remain the hand, the foot the foot, in the political body the

accident of birth entails no such fate. By virtue the meanest are exalted ; lacking virtue, the most exalted become debased. There is therefore this further incentive to the careful consideration of this subject, that, in addition to the *general* interest each member must have in the welfare of the whole body, he has this *particular* interest, that the improvement of his personal condition, while practically in his own hands, must be contingent upon the observance of those rules which have been adopted to advance the interests of all.

Table VI. is intended to exhibit the various classes amongst which persons are distributable, the relations they may establish between themselves, and the characters they may individually assume. The relation of Sovereign and subject has been discussed in the chapters on General Jurisprudence, Constitutional Law, and International Law. The remaining rights, duties, and obligations of persons are of two kinds—those derived from the *Public*, and those from the *Private* Municipal Law of their land. It is with the former only that we are here concerned, and which, together with the consideration of property, constitute the topic of our remaining remarks.

**Property.**—Property, as has been already stated, is either *public* or *private* ; in fact, therefore, each British citizen possesses two species of property : that which belongs to him as a member of the State, and that which belongs to him in his individual capacity. His interests are consequently twofold, *public* and *private* ; hence all contributions made by him from his private to the public purse are, in strictness, mere appropriations of his wealth for the support of one branch

of his interests ; and assuming the public trustees to act wisely and conscientiously with the contribution laid by him at their disposal, even in a private sense his contribution to the public necessities is an investment advantageous to himself as a private individual ; for all property, whether public or private, can only be regarded as a means to an end—the end being *happiness* ; the means to that end, *property*. Without property it is impossible either for the State or for the individual to exist : food, raiment, and habitation are its three elementary forms. Life and property thus necessarily constitute the great concern of Public Municipal Law—the life of the State, and the life of its members. The property of the State, and the property of individuals, are consequently the *res sacræ*. Both are gifts of Heaven, and alike conditioned upon the proper use of the means furnished by the Almighty for their acquisition, preservation, and enjoyment.

**The Branches of Municipal Law.**—Municipal Law may be divided into two branches, *substantive* and *adjective*. The difference between these two branches has been already explained (p. 90). As the adjective branch of the law embraces, in addition to the law of *evidence*, the law of *procedure*, it necessarily comprises the consideration of the *machinery* and *functionaries* of the law. The *substantive* law may also be divided into two branches : the *public* and the *private*. With the *private substantive law*, embracing all the *duties, rights, and obligations* flowing from or incident to civil status, character, or contract, as administered either by the Courts of Common Law or by the Courts of Equity, we are not concerned in the study of Public Municipal Law.

**The Objects of Public Municipal Law.**—The objects of Public Municipal Law are those *Duties* and *Rights* which, by experience, it has been found necessary or expedient to impose and create, in order to ensure to the State, and to its individual members, *Peace* and *Plenty*, or, in one word, *Happiness*, which involves not merely the present but the future, for it is impossible for a rational being to be happy whose sense of plenty and security is limited to the present. Provision for the present and for the future of a State appears to involve the consideration of three distinct necessities—1, the making secure that which is actually in being; 2, the maintenance of that security in the immediate future; and 3, the maintenance of that security in the more remote future. In other words, provision has to be made for *being*, for *growth*, and for *replenishment*. We will therefore, in this order, consider the principal provisions of our Municipal System.

**Crime.**—The violation by a subject of a *duty* imposed upon him by the State is termed a *Crime*. All public offences are indictable; or, in other words, all indictable offences are public offences. All indictable offences are Crimes.

The law of England divides public offences, according to their reputed gravity and the consequent severity of the punishment they entail, into three classes—viz., *Treasons*, *Felonies*,<sup>1</sup> and *Misdemeanors*.

**Felony**, in the general acceptance of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands and goods.

<sup>1</sup> 'Fe-lon, according to Spelman, is derived from two northern words: *fee*, which signifies the fief, feud, or beneficiary estate; and *lon*, which signifies price or value. Felony is therefore the same as *pretium feudi*; the consideration for which a man gives up his fief; as we say, in com-

'Treason itself,' says Sir Edward Coke, 'was antiently comprised under the name of felony; and in confirmation of this we may observe that the Statute of Treasons (25 Edw. III. c. 2), speaking of some dubious crimes, directs a reference to Parliament, that it may be there adjudged "whether they be treason, or *other* felony." All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason.'<sup>1</sup>

'Felony by the common law is against the life of a man: as murder, manslaughter, *felo de se*; or against a man's goods, such as larceny and robbery; against his habitation, as burglary, arson, or housebreaking; and against public justice, as breach of prison.'<sup>2</sup>

The distinction between felonies and misdemeanors is purely arbitrary, and indicates rather the measure of punishment than any characteristic of the offence. The forfeiture implied by the term is now in no way necessarily attached to the particular crimes ranged under that head. But though the word felony may be said to be no longer more than a bare term, the words *felonious* and *feloniously* are of the utmost importance; whether a given act was or was not done with a *felonious intent* being of the very essence of the matter.

**A Misdemeanor** is any crime less than a felony; the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offences which do not amount to felony. Misdemeanors have been sometimes termed *misprisions*.

**Misprisions** (*mispris*, *Fr.*, *neglect or contempt*).—The

mon speech, such an act is as much as your estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord.' (Steph. Com., vol. iv., p. 93, which see for other explanations of the term.)

<sup>1</sup> Steph. Com., vol. iv. p. 92.

<sup>2</sup> See 3 Inst. (Coke's), p. 47 *et seq.*

word *misprision*, in its larger sense, signifies every considerable misdemeanor which has not a specific name given to it in the law. It is said that a misprision is contained in every treason or felony, and that one who is guilty of treason or felony may be proceeded against for a misprision only<sup>1</sup> if the Queen please.<sup>2</sup> But generally misprision of felony is taken for concealment of felony, or procuring a concealment thereof.<sup>3</sup> It is enacted, 7 & 8 Geo. IV., c. 28, s. 8, that 'Every person convicted of any felony not punishable with death, shall be punished in the same manner prescribed by the statute or statutes specially relating to such felony; and every person convicted of any felony, for which no punishment hath been, or hereafter may be, specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court think fit), in addition to such imprisonment.'

**Felonious.**<sup>4</sup>—The terms *felonious*, *feloniously*, *with felonious intent*, import intention to do a wrongful

<sup>1</sup> See *Misprision of Treason*, p. 363.

<sup>2</sup> 1 Hawkins, *Pleas of the Crown*, c. 5. 2 Burn's *Justices of the Peace*, 'Felony.'

<sup>3</sup> 1 Hawk. P. C., c. 7, § 2, p. 73.

<sup>4</sup> The word 'feloniously' in a Statute makes the offence felony: *Rex v. Johnson*, 3 M. and S., 556. All crimes which involve judgment of life or member by any Statute become thereby felonies, whether the word felony be mentioned or not; see 1 Hale, P. C., 703; 1 Hawk. P. C., c. 40, s. 2. But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a Statute; and, therefore, if it be prohibited under 'pain of forfeiting all that a man has,' or of forfeiting 'body and goods,' it shall amount to no more than a high misdemeanor. See *id.* s. 3. . . . Where a Statute makes an offence felony which was before a misdemeanor, no indictment lies for the misdemeanor. *Rex v. Cross*, 1 Lord Raym. 711; 3 Salk. 193; Petersdorff's *Abridgment*, vol. iv. p. 450.

act knowing it to be wrongful; an act done without the colour of right to excuse the act.<sup>1</sup>

**Persons Capable of Committing Crimes.**—No person is excused from punishment for disobedience to the laws of the land, except such as are expressly defined and exempted by the laws themselves. In order to ascertain what persons, and upon what principle, they are exempted, it is necessary to bear in mind the definition of a crime. For the present purpose it is sufficient to say that there is no crime where there is not in combination a *vicious will* with an *unlawful act*, the consequence of that vicious will. There are three cases in which the will does not join with the act.

1. *Where there is a want or defect of understanding.* For where there is no understanding, there is no will to guide the conduct.

**Infants.**—By the law of England, an infant under seven years of age cannot be guilty of felony.<sup>2</sup> Above seven and under fourteen, an infant is deemed *primâ facie* to be *doli incapax*; but when this presumption is rebutted by unimpeachable evidence of a mischievous discretion, it is said that *malitia supplet ætatem*, and the infant is held to be criminally liable.<sup>3</sup> Incapacity on the ground of infancy ceases upon the attaining of fourteen years of age, at which period the law presumes him to be *doli capax*. An infant under fourteen years of age cannot be found guilty of a rape.<sup>4</sup>

**Persons non compotes mentis.**—Persons mentally incapacitated from distinguishing between right and wrong, have been divided into three classes: 1, *A nati-*

<sup>1</sup> See Archbold's Pleading and Evidence in Criminal Cases, p. 282.

<sup>2</sup> *Mirr. c. 4, § 16.*

<sup>3</sup> 1 Hale, P. C., p. 19.

<sup>4</sup> *Rex v. Groombridge*, 7 C. and P., p. 582.

*vitae, vel dementia naturalis*; 2, *Dementia accidentalis, vel adventitia*; 3, *Dementia affectata*.—A NATIVITATE. An idiot is one who is *non compos mentis* from his birth, by a perpetual infirmity, without lucid intervals.<sup>1</sup> The question, idiot or not, is a question of fact for the jury<sup>2</sup>; when established, it exempts the offender from punishment. DEMENTIA ACCIDENTALIS is, 1st, *permanent*, called madness; 2nd, *temporary*—the object of it enjoying lucid intervals—called lunacy; 3rd, *partial*—the object of it being sane upon all subjects but one—called monomania. DEMENTIA AFFECTATA is the perfect, though temporary, frenzy or insanity produced by the use of intoxicating liquors.

When the deprivation of the understanding and memory is total, fixed, and permanent, it excuses all acts; so likewise a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence.<sup>3</sup> 'To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.'<sup>4</sup>

*Dementia affectata*, produced by the vice of drunkenness, does not excuse the commission of any crime.<sup>5</sup> Upon an indictment for murder, however, the intoxication of the defendant has been taken into considera-

<sup>1</sup> Co. Litt., p. 247a.

<sup>2</sup> Bac. Abr. Idiot.

<sup>3</sup> Beverley's Case, 4 Coke's Reports, p. 125; Co. Litt., p. 247a.

<sup>4</sup> Answer of the Judges to the questions of the House of Lords in the case of Reg. v. M'Naughten, 10 Cl. and Fin., p. 200, which see.

<sup>5</sup> 1 Hale, p. 32.

tion, as a circumstance to show that the act was not premeditated.<sup>1</sup>

For other cases, where the offender is excused, *e.g.*, where the intoxicating liquor has been administered by a physician or an enemy, see Archbold, p. 14.

2. *Where there is sufficient understanding and will residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it.*<sup>2</sup>

Under this head it may be laid down as a *general* principle, that when the accidental mischief attends the performance of a *lawful act* done with *proper caution*, the person inflicting the mischief is excused; but when it attends the doing of an *unlawful act*, or the incautious doing of a lawful act, he is not.<sup>3</sup>

|| 3. *Where the action is constrained by some outward force and violence.* Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the person is obliged to perform.<sup>4</sup> Thus, if A by force take the hand of B, in which is a weapon, and therewith kill C, A is guilty of murder; but B is excused.<sup>5</sup> In general, if a crime is committed by a wife in the presence of her husband, the law *presumes* that she acted under his immediate coercion, and excuses her from punishment; but see Archbold's Criminal Pleading, p. 18. Ignorance of the law is no excuse,—*Ignorantia legis neminem excusat.*

<sup>1</sup> R. v. Grindley, 1 Russ. p. 12; but see R. v. Carroll, 1 Russ. p. 15.

<sup>2</sup> Steph. Com., vol. iv. p. 107.

<sup>3</sup> Steph. Com., vol. iv. p. 114.

<sup>4</sup> Steph. Com., vol. iv. p. 107.

<sup>5</sup> 1 Hale, p. 433.

**Principal and Accessories.**—Two or more individuals may be implicated in a given crime, but in different ways and degrees. Such individuals fall under one of four designations: 1st, Principals in the first degree; 2nd, Principals in the second degree; 3rd, Accessories before the fact; or, 4th, Accessories after the fact.

*A principal in the first degree* is one who is the actor or actual perpetrator of the fact.<sup>1</sup> Actual presence when the offence is consummated, is not necessary; e.g., the poisoner may lay the poison, but be absent when it is taken. An innocent hand may be used as the instrument of injury; e.g., an infant under seven years of age, or an idiot.<sup>2</sup>

*A principal in the second degree* is one who is present, aiding and abetting, at the commission of the fact. Presence in this sense is either actual or constructive. As in the last case, physical presence is not necessary. He is, in construction of law, present, aiding and abetting, if, with the *intention* of giving assistance, he is near enough to afford it, should the occasion arise. The mere fact, however, of not endeavouring to prevent the felony, or to apprehend the felon, is not sufficient; nor is a mere participation in the act, there being no felonious participation in the design.<sup>3</sup>

*An accessory before the fact* is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.<sup>4</sup>

*An accessory after the fact* is one who, knowing a

<sup>1</sup> 1 Hale, p. 615.

<sup>2</sup> See Archbold, Crim. Pleading, p. 4.

<sup>3</sup> *Ib.*, p. 4 *et seq.*

<sup>4</sup> 1 Hale, p. 615; see Archbold's Crim. Pleading, p. 8.

felony to have been committed by another, receives, relieves, comforts, or assists the felon.<sup>1</sup> But merely suffering the principal to escape, will not make the party an accessory after the fact; for it amounts, at most, but to a mere omission.<sup>2</sup> Nor is a wife punishable as an accessory for receiving &c. her husband, although she knows him to have committed a felony.<sup>3</sup>

**A Conspiracy** is an agreement between two or more persons:—1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him. 2. Wrongfully to injure or prejudice a third person, or any body of men, in any other manner. 3. To commit any offence punishable by law. 4. To do any act with intent to pervert the course of justice. 5. To effect a legal purpose with a corrupt intent, or by improper means. 6. To which may be added conspiracies or combinations by journeymen to raise their wages, &c. All which are indictable offences.<sup>4</sup>

**Attempts.**—The 14 and 15 Vic. c. 100, s. 9, enacts—  
‘And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof; for remedy thereof be it enacted, that if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of

<sup>1</sup> 1 Hale, p. 617; see Archbold's Crim. Pleading, p. 10.

<sup>2</sup> 1 Hale, p. 618.

<sup>3</sup> *Ib.*, pp. 48, 621.

<sup>4</sup> See Archbold's Crim. Pleading, p. 809.

an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.'

**Security—Crimes against the State—against the Lives or Persons of its Dignitaries.—**

**High Treason.**—By the Declaration of Treasons, 25 Edw. III., st. 5, c. 2, the following are specified as treasons:—1, When a man doth compass or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or, 2, If a man do violate the King's companion (his wife), or the King's eldest daughter, unmarried, or the wife of the King's eldest son and heir; or, 3, If a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be proveably attainted of open deed by the people of their condition. . . . The Act of Settlement,<sup>1</sup> 12 & 13 Wm. III., c. 2, limits the succession to the Crown, and by 1 Anne, st. 2, c. 17, s. 3, the endeavouring, by any overt act, to deprive or hinder such persons, being the next in succession, from succeeding to the Crown, is made treason.

<sup>1</sup> See *ante*, p. 191.

The 7 & 8 Wm. III. c. 3 (1695) regulates trials in cases of Treason and Misprision of Treason, and provides that a copy of the *indictment* for treason shall be delivered to the accused five days before the trial. The 7 Anne, c. 21 (1708) provides that, after the decease of the Pretender,<sup>1</sup> and three years after the succession to this Crown by the demise of the Queen, no attainder for treason shall disinherit any heir. The 20 Geo. II. c. 30 (1757) allows the accused to make his defence by counsel. The remaining Acts are 36 Geo. III. c. 7 (1795); 39 & 40 Geo. III. c. 94 (1800), as to trials; 54 Geo. III. c. 146 (1814) alters the punishment in certain cases of High Treason; 57 Geo. III. c. 6 (1817) affects the Prince Regent; 5 & 6 Vic. c. 51 (1842) provides for the further security and protection of Her Majesty's person; the 11 Vic. c. 12 (1848) provides for the better security of the Crown and Government of the United Kingdom; and the 33 & 34 Vic. c. 23 (1870), which is entitled 'An Act to abolish Forfeitures for Treason and Felony, and to otherwise amend the law relating thereto.'<sup>2</sup>

<sup>1</sup> He died at Rome, December 30, 1765. His son Charles, styled the young Pretender, was born in 1720, and died January 31, 1788. His brother, the Cardinal York, who styled himself Henry IX. of England, died at Rome in 1807.

<sup>2</sup> The judgment passed upon a convicted traitor prior to the 4th July, 1870, was:—1, That the offender be drawn on a hurdle to the place of execution; 2, that he be hanged by the neck until he be dead; 3, that his head be severed from the body; 4, that his body be divided into four quarters; 5, that his head and quarters be at the disposal of the Crown. (4 Steph. Com., p. 248. See Foster's Crim. Law, or Archbold's Pleading and Evidence in Criminal Cases, p. 622 *et seq.*) The 33 & 34 Vic. c. 23, s. 31, repeals such portions of 13 Geo. III. c. 48, and 54 Geo. III. c. 146, as enact that the 'judgment required by law to be awarded against persons adjudged guilty of high treason shall include the drawing of the person on a hurdle to the place of execution, and, after execution, the severing of the head from the body, and the dividing of the body into four quarters.'

**Misprision of Treason.**—Misprision of treason consists of the bare knowledge and concealment of treason without any degree of assent thereto, for any assent makes the party a principal traitor; as, indeed, did the concealment, which, at the Common Law,<sup>1</sup> was construed aiding and abetting. The 1 & 2 P. & M. c. 10, s. 8, enacts that a bare concealment of treason shall be held only a misprision.

As to attempts to injure or alarm the Queen, see 5 & 6 Vic. c. 51, s. 2.<sup>2</sup>

**Inciting to Mutiny.**—The 37 Geo. III. c. 70, s. 1, enacts—‘That any person who shall maliciously and advisedly endeavour to seduce any person or persons, serving in His Majesty’s forces by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer *death*, as in cases of felony, without benefit of clergy.’<sup>3</sup> By 7 Wm. IV., and 1 Vic. c. 91, s. 1, the punishment is reduced to *transportation* or *imprisonment*.<sup>4</sup>

**Compassing to levy War.**—11 Vic., c. 12, s. 3, enacts—‘If any person whatsoever, within the United

<sup>1</sup> Steph. Com., vol. iv. p. 249.

<sup>2</sup> See Appendix.

<sup>3</sup> The privilege called *benefit of clergy*, by which all clerks in orders were discharged from many kinds of capital felonies, and which was afterwards extended to laymen in general, but on condition of their being burnt in the hand, fined, or whipped, was abolished by 7 & 8 George IV. c. 28, which provides for the due punishment, short of death, of all persons committing offences formerly clergyable.

<sup>4</sup> See Archbold’s Pleading and Evidence in Criminal Cases, p. 675 *et seq.* See Appendix.

Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassing, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony.'

**Illegal Training and Drilling.**—60 Geo. III. & 1 Geo. IV., c. 1, s. 1, recites, that in some parts of the United Kingdom, men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of His Majesty's peaceable and loyal subjects, and the imminent danger of the public peace; and enacts, that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled, to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from His Majesty, or the lieutenant or two justices of the peace of any county or riding, or of any stewardry,

by commission or otherwise, for so doing, shall be and the same are hereby prohibited, as dangerous to the peace and security of His Majesty's liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be, trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had.<sup>1</sup>

**Crimes against Public Justice.—Perjury.**—2 Geo. II., c. 25, s. 2,—‘The more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such person to be sent to some *house of correction* within the same county, for

<sup>1</sup> See 20 & 21 Vic. c. 3.

a time *not exceeding seven years*, there to be kept to *hard labour* during all the said time, or otherwise to be *transported* to some of His Majesty's plantations beyond the seas for a term not exceeding seven years, as the court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person, so committed or transported, shall voluntarily escape or break prison, or return from transportation, before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy,<sup>1</sup> and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.'

14 and 15 Vic. c. 100, s. 19, empowers any judge to direct a prosecution for perjury against any person who shall appear to him to have been guilty of this offence in any proceedings before the Court, and to commit the offender; he may, however, accept satisfactory bail.

An oath or affirmation,<sup>2</sup> to amount to perjury, must be taken in a *judicial proceeding*, before a *competent jurisdiction*; it must also be *material* to the question depending, and it must be *false*.<sup>3</sup>

<sup>1</sup> See Benefit of Clergy, *ante*, p. 363, note.

<sup>2</sup> *Rex v. Aylett*, 1 T. R., p. 69.

<sup>3</sup> By 3 and 4 Will. IV., c. 49, Quakers and Moravians; by 3 and 4 Will. IV. c. 82, Separatists; by 1 and 2 Vic. c. 77, persons who have been Quakers or Moravians, are permitted to give their evidence on *affirmation* in lieu of *oath*.

1. *It must be taken in a judicial proceeding.* As if the defendant swear falsely, when examined as a witness at a trial; or in depositions, or in an answer to a bill in Chancery, or in an affidavit used in any legal proceeding.<sup>1</sup>

2. *It must be taken before a competent jurisdiction.* For, if it appear to have been taken before a person who had no lawful authority to administer an oath, or who had no jurisdiction of the cause, the defendant must be acquitted.

3. *That part of the oath upon which the perjury is assigned must be material to the matter under the consideration of the Court.* If a man swear that J. S. beat another with a sword, and it turns out that he beat him with a stick, this is not perjury; for all that was material was the beating.<sup>2</sup>

4. *The matter sworn must be either false in fact, or if true, the defendant must not have known it to be so.* It is perjury if a man swears that he believes a fact to be true which he must know to be false.<sup>3</sup>

5. *The false oath must be taken deliberately and intentionally.*<sup>4</sup>

**Subornation of Perjury at Common Law** is the procuring a man to take a false oath amounting to perjury, the man actually taking such oath; if he do not actually take it, the person *inciting*, though not guilty of the crime of subornation, is nevertheless punishable for the *incitement*.<sup>5</sup>

**Offences against the Law of Nations.**—For the information that the limits of this outline permit on this

<sup>1</sup> 3 Inst. p. 166.

<sup>2</sup> Hetley, p. 97.

<sup>3</sup> 1 Hawk., c. 27, s. 2.

<sup>4</sup> 3 Inst. p. 166 *et seq.*

<sup>5</sup> Rex v. Pedley, 1 Leach, p. 325.

<sup>6</sup> 1 Hawk., c. 27, s. 10.

head, the reader is referred to the chapter on International Law.<sup>1</sup>

**Crimes against Public Property.**—Offences against *public*, as distinguished from *private*, property scarcely admit of consideration in an institutional work, the distinction referring rather to the *subject* of property than to the *essence* of the wrong. Three subjects, however, of public property demand special notice, viz., Offices, the Revenue, and the Coinage.

**Offices.**—By 5 & 6 Edw. VI. c. 16 (confirmed and extended by 49 Geo. III. c. 126) it is enacted, that persons buying or selling, or receiving or paying money or reward for, any office in the gift of the Crown (with certain exceptions); and persons receiving or paying money for, or soliciting or obtaining, any such office, or making any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office; shall, respectively, be deemed guilty of a misdemeanor.<sup>2</sup>

The 17 & 18 Vic. c. 102 (1854), entitled ‘An Act to consolidate and amend the Laws relating to Bribery, Treating, and undue Influence at Elections of Members of Parliament,’ provides:—

Sec. 2. ‘The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:

‘1. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration to or for any voter,

<sup>1</sup> See Appendix.

<sup>2</sup> See Steph. Com., vol. iv. p. 271.

or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election :

‘ 2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election :

‘ 3. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make any such gift, loan, offer, promise, procurement or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election :

‘ 4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election :

‘ 5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any

money wholly or in part expended in bribery at any election :

‘And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of one hundred pounds to any person who shall sue for the same, together with full costs of suit : provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bond fide* incurred at or concerning any election.’

Sec. 3. ‘The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly :

‘1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree or contract for any money, gift, loan or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election :

‘2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting, at any election :

‘And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of ten pounds to any person who shall sue for the same, together with full costs of suit.’

The 31 & 32 Vic. c. 125, § 45, further enacts that  
'Any person, other than a candidate, found guilty of bribery in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, during the seven years next after the time at which he is so found guilty, be incapable of being elected to and sitting in Parliament; and also be incapable—

'1. Of being registered as a voter and voting at any election in the United Kingdom; and

'2. Of holding any office under the act of the session of the fifth and sixth years of the reign of His Majesty King William the Fourth, chap. 76, or of the session of the third and fourth years of the reign of her present Majesty, chap. 108, or any municipal office; and

'3. Of holding any judicial office, and of being appointed and of acting as a justice of the peace.'

That every office of the State, from the highest to the lowest, is public property; that capacity and virtue are the only qualifications for office; and that to confer or to endeavour to obtain office from any motive other than the public good, is a fraud upon the public,—are propositions too obvious to admit of comment.

**The Revenue.**—As it is impossible for the State to exist without the means necessary for the support of State requirements, it becomes one of the most important duties of Parliament to determine what those necessities are, and the way in which they may be most advantageously and equitably met; in other words, it is the duty of Parliament, on the one hand, to see that

<sup>1</sup> For further enactments on this subject, see Davis's Law of Registration and Elections, and 35 and 36 Vic., c. 33, commonly called the Ballot Bill.

the State expenditure is neither too much nor too little, both extremes being equally improvident; and, on the other hand, to secure that the burthen, be it what it may, shall be imposed upon each individual in a manner exactly corresponding to his ability to bear it. Having so ascertained and distributed the burthen, it becomes the duty of each citizen to discharge his individual obligation. Every attempt to evade it is a wrong done to the rest. This burthen is imposed in one of two ways, either by what is termed *direct* taxation or by *indirect* taxation. In the former case, a given sum of money, determined by a given standard, is demanded from each; in the latter, certain imposts are placed upon the possession, manufacture, sale, import, or export of given articles. The various statutes regulating these matters must be referred to, in order to ascertain each particular crime and its consequences.

**The Currency.**<sup>1</sup>—Money is the medium of commerce.

<sup>1</sup> The first coinage in England was under the Romans at Camalodunum, or Colchester. English coin was of different shapes—as square, oblong, and round—until the Middle Ages, when round coin only was used. Grotes were the largest silver currency until after 1531. Coin was made sterling in 1216; before which time rents were mostly paid in kind, and money was found only in the coffers of the barons. (Stow.)

	A.D.
The first gold coins on certain record, struck 42 Hen. III. ...	1257
Gold florin, first struck Edward III. (Camden) ...	1337
(Ashe) ...	1344
Old "sovereigns first minted" ...	1494
Shillings first coined (Dr. Kelly) ...	1603
Crowns and half-crowns coined ...	1653
Irish shilling struck ...	1660
Milled shilling of Elizabeth ...	1662
First large copper coinage, putting an end to the circulation of private leaden pieces, &c. ...	1620
Modern milling introduced ...	1631
Halfpence and farthings coined ...	1665
By the Government 23 Car. II. ...	1672
Guineas first coined, 25 Car. II. ...	1673

It is the Sovereign's prerogative, as the arbiter of domestic commerce, to give it authority, or make it current. It is the representative or sign of value between buyer and seller, between debtor and creditor.<sup>1</sup> It is a rule of Common Law that there can be no *legal tender*, or, in other words, that no tender of payment of any debt is valid and sufficient, unless made in the common coin of the realm. This, however, is subject, by the Statute Law, to exception; for by 3 & 4 Will. IV. c. 98, s. 6, a tender may be made in Bank of England

Double guineas	...	...	...	...	...	...	...	1673
Five guineas	...	...	...	...	...	...	...	1673
Half-guineas	...	...	...	...	...	...	...	1673
Quarter guineas coined 3 Geo. I.	...	...	...	...	...	...	...	1716
Seven-shilling pieces coined	...	...	...	...	...	...	...	1797
Two-penny-copper pieces	...	...	...	...	...	...	...	1797
Sovereigns, new coinage	...	...	...	...	...	...	...	1817
Half-farthings	...	...	...	...	...	...	...	1843
Silver florin	...	...	...	...	...	...	...	1849

Gold coin was introduced in six-shilling pieces by Edward III., and nobles followed at six shillings and eightpence, and hence the lawyer's fee; afterwards there were half and quarter nobles. Edward IV. coined angels with a figure of Michael and the Dragon, the original of George and the Dragon. Henry VIII. coined sovereigns and half-sovereigns of the modern value. Guineas were of the same size, but being made of superior gold from sovereigns, guineas passed for more. English and Irish money were assimilated January 1, 1826.

Queen Elizabeth caused the base coin to be recalled, and genuine issued in 1560. During the reigns of the Stuarts the coin was greatly debased by clipping, &c. A commission (viz., Lord Somers, Sir Isaac Newton, and John Locke) was appointed by William III. for its reformation. An Act was passed in 1696, withdrawing the debased coin from circulation, and 1,200,000*l.* was raised by a house duty to defray the expense. The coin of the realm was about twelve millions in 1711—Davenant. It was estimated at sixteen millions in 1762—Anderson. It was supposed to be twenty millions in 1786—Chalmers. It amounted to thirty-seven millions in 1800—Phillips. The gold is twenty-eight millions, and the rest of the metallic currency is thirteen millions, while the paper largely supplies the place of coin, 1830—Duke of Wellington, Prime Minister, in the House of Lords. In 1840 the metallic currency was calculated as reaching forty-five millions; and in 1853 was estimated as approaching, in gold and silver, sixty millions. (Haydon's Dictionary of Dates, by Vincent, "Coin," 9th ed.)

<sup>1</sup> Steph. Com., vol. ii. p. 540.

notes, payable to bearer on demand, for all sums above 5*l.*, so long as the Bank continues to pay on demand in legal coin.<sup>1</sup> A legal tender cannot be made in silver of an amount exceeding 40*s.*<sup>2</sup>

The *denomination*, or the value for which the coin is to pass current, is regulated by the weight and fineness of the metal used. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called *esterling* or *sterling* metal, of which sterling metal all the coin of the kingdom must be made.<sup>3</sup> Hence by 24 & 25 Vic. c. 99, counterfeiting, colouring, altering, impairing, or uttering such counterfeit coin, is made a criminal offence.

**Forgery at Common Law** may be defined to be the fraudulent making or alteration of a stamp to the prejudice of the revenue; or of a writing, or seal, to the prejudice of another man's right. In reference to this crime, as regards writings, it has been decided that the instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observation;<sup>4</sup> that any material alteration, however slight, is a forgery, as well as an entire fabrication;<sup>5</sup> that the fraudulent application of a false signature to a true instrument, or a real signature to a false one, are consequently both forgeries;<sup>6</sup> and that even if the name forged be merely a fictitious one, it is as much forgery if done for the purpose of fraud, as if the name were that of a real person.<sup>7</sup> At Common Law this offence was a misdemeanor only; but when, in the

<sup>1</sup> Steph. Com., vol. ii. p. 542.

<sup>2</sup> 56 Geo. III. c. 68, §§ 11, 12.

<sup>3</sup> 25 Edw. III. c. 13.

<sup>4</sup> See Steph. Com., vol. iv. p. 225.

<sup>5</sup> 2 East P. C., c. 19, s. 4.

<sup>6</sup> Chit. Crim. Law, p. 1038.

<sup>7</sup> R. v. Boutien; R. & R. C. C. R., p. 260.

progress of society, the perpetration of it became more easy, and its tendencies more dangerous, it became necessary to assign to it a more penal character, as regards those instruments that most required protection.<sup>1</sup> See 24 & 25 Vic. c. 98.<sup>2</sup>

**Crimes against the Life or Person—Murder.—**

Murder is defined by Lord Coke to be ‘where a person of sound memory and discretion unlawfully killeth<sup>3</sup> any reasonable creature in being, and under the King’s peace, with malice aforethought, either express or implied.’<sup>4</sup> ‘The death must take place within one year and a day from the alleged act of violence, otherwise the law presumes that the death was occasioned by some other cause.’<sup>5</sup> In every case where a homicide is proved, the law presumes malice, but such presumption may be rebutted by showing that it took place under

<sup>1</sup> Steph. Com., vol. iv. p. 225.

<sup>2</sup> As to the false personation of seamen, see 11 Geo. IV., & 1 Wm. IV. c. 20, § 84; of soldiers, 7 Geo. IV. c. 16, § 38; of owners of stock, &c., 24 and 25 Vic. c. 98, § 3; of Bail &c., § 34, and Arch. C. L., p. 525.

<sup>3</sup> Murder may be by any form of death by which human nature may be overcome: as by poisoning, starving, striking, drowning; or by any act, the probable consequence of which may be, and eventually is, death, although no stroke were struck by the accused himself. Where an apprentice died from harsh treatment and want of care upon the part of his master, while he was labouring under disease; this was held murder in the master. So where a woman, entrusted with a female child of tender age, by want of care and ill-treatment caused her death. If a man be in dying circumstances, and another give him a wound or hurt which hastens his death, this is such a killing as constitutes murder. So if one, under a well-grounded apprehension of personal violence, do an act which causes his death—as for instance, jumps out of a window—he who threatened is answerable for the consequences. But if a man put another into such a passion of grief or fear that he die either suddenly or by a disease contracted thereby, in a human judicature it cannot come under the judgment of felony, because no external act of violence was offered of which the law can take notice. For cases in support of these and the remaining propositions of the Criminal Law, contained in foot-notes, see, under the proper title, Archbold, Boothby, or Russell.

<sup>4</sup> 3 Inst., p. 47.

<sup>5</sup> Hawk., c. 13, § 9.

circumstances which the law recognises as *justifiable* or *excusable*, or that at most it amounted only to *manslaughter*. Upon an indictment for murder, the defendant may be found guilty of the latter offence.

**Justifiable Homicide** is where the proper officer executes a criminal in strict conformity with his sentence;—where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it;—where the homicide is committed in prevention of a forcible and atrocious crime.

**Excusable Homicide** is where a man, doing a *lawful* act, without any intention of hurt, by accident kills another—called homicide *per infortunium*; or by misadventure; or where a man kills another upon a sudden rencounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling—termed homicide *se defendendo*. By 9 Geo. IV. c. 31, s. 10, no punishment or forfeiture is incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without any felony.

**Manslaughter.**—Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, yet *the malice, express or implied, which is the very essence of murder, is wanting*. As the offence can only be where there is no premeditation, there cannot, in the case of manslaughter, be any accessories before the fact, but there may be accessories after. Manslaughter has been described as of two kinds: *voluntary*, as where death ensues upon a fight arising from a sudden quarrel, or where if a man being greatly provoked immediately kills the

aggressor; *involuntary*, is where a man, doing an *unlawful* act, by accident kills another, or when doing an act lawful in itself, but in an unlawful manner, and without due caution and circumspection. As the law presumes every homicide to be murder, it is for the defendant to show the contrary.

**Assault and Battery.**—An assault<sup>1</sup> is an attempt to commit a forcible crime against the person of another: such as an attempt to commit a battery, murder, robbery, rape, &c.<sup>2</sup> The 24 & 25 Vic. c. 100, s. 47, enacts that—‘Whosoever shall be convicted upon an indictment of any *assault occasioning actual bodily harm*, shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour: and whosoever shall be convicted upon an indictment for a *common assault* shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour.’

<sup>1</sup> Mere words do not amount to an assault. Striking at another with fist or stick, &c., although the party misses his aim, is an assault; and so is the drawing a sword, presenting a gun, pointing a pitchfork, or any act indicating an intention, coupled with an ability to exercise violence; and this though the accused were stopped in his purpose. A battery is to beat or wound. If one strike or throw anything at another, if he miss him it is an assault; if he hit him it is a battery; thus every battery includes an assault. A ‘wounding’ is where the violence is so great as to draw blood. The legal acceptance of ‘to beat,’ includes every touching of another’s person or clothes, however trifling, in an angry or insolent manner: as thrusting or pushing him in anger; holding him by the arm; spitting in his face; jostling him out of the way; pushing another man against him; throwing a squib at him; striking a horse upon which he is riding, whereby he is thrown. An unlawful imprisonment is also an assault; so also is the exposing a child of tender years, or under the control and dominion of the party, to the inclemency of the weather; but merely omitting to do an act, without a duty, will not create an indictable offence.

<sup>2</sup> Archbold, p. 566.

A *battery*, in the legal acceptation of the word, includes beating and wounding. To *beat*, means not merely to strike forcibly with the hand, or a stick, or the like, but includes every *touching*, or laying hold, however trifling, of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner.<sup>1</sup>

**False Imprisonment.**—An unlawful imprisonment is an assault.<sup>2</sup> Every confinement of the person is an imprisonment, whether it be in a common prison or a private house, or by forcibly detaining in the public streets.<sup>3</sup> A person charged with this offence is indicted for an Assault and False Imprisonment. The

<sup>1</sup> An injury purely accidental, the party causing it being wholly without fault, is not a battery, unless it is in the course of an unlawful act, as where two are fighting, and one of them unintentionally hits a third person. So if a horse running away with its rider strikes a man; or if a soldier in his rank discharges his gun, and a man unexpectedly passing at the time is hurt by it. *Lawful chastisement*: If a parent in a *reasonable* manner chastise his child; or a master his servant, being actually his servant at the time; or a master his scholar; or a gaoler his prisoner; or a husband his wife; or if one confine his friend who is mad, and bind and beat him; in such circumstances it is no assault; but in all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. That the alleged battery was in self-defence, will be a justification even of a wounding or mayhem; and if A lift up his staff or stick and offer to strike B, the latter need not wait until he is struck, in order to justify his striking A. But in all cases it depends on the circumstances, and is therefore matter of evidence, whether the battery, or as it may be, was in proportion to the original assault. A husband may justify a battery in defence of his wife; a parent of his child; a master of his servant; and the converse holds as to each of these relations.

<sup>2</sup> 1 Hawk. c. 15, s. 4, p. 119.

<sup>3</sup> Comyn's Digest, 'Imprisonment' (c). Though a party, on being shown a magistrate's warrant, goes willingly at the desire of a constable, this is an imprisonment (*Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, 1 R. & M. N. P. 321); otherwise, if the warrant is used only as a summons, and the party goes voluntarily. Where a man, who had an idiot brother bed-ridden in his house, kept him in a dark room, without sufficient warmth or clothing; this was held not to be an imprisonment (*Smith's Case*, 2 C. & P. 449).

proof of the imprisonment may fail ; that of the assault succeed.<sup>1</sup>

**Intimidation.**—Jealous of the subject's right to feel himself secure, and at the same time free from coercion, the law makes a false imprisonment and an assault and battery felony ; so intimidation practised towards the parties or witnesses in a court of justice, the endeavouring to dissuade a witness from giving evidence, or attempting to influence jurors corruptly, called *embracery*, are by the Common and Statute Law indictable offences ; so likewise the sending of letters threatening to burn or destroy houses ;<sup>2</sup> threatening to murder ;<sup>3</sup> threatening to publish a libel with intent to extort money ;<sup>4</sup> or to accuse another of a crime for the like purpose.<sup>5</sup> For other crimes against the person, see Appendix.

**Crimes against Property.**—**Arson**, at Common Law, is the malicious burning of the house of *another* by night or by day.<sup>6</sup> The 24 & 25 Vic. c. 97, s. 3, enacts that—' Whosoever shall *unlawfully and maliciously* set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, *whether the same shall then be in the possession of the offender, or in the possession of any other person*, with intent thereby to injure or defraud any person, shall be guilty of felony.'<sup>7</sup>

The burning must be done wilfully and maliciously in order to constitute the offence either at Common Law

<sup>1</sup> See Archbold, pp. 695, 658.

<sup>2</sup> 24 & 25 Vic. c. 97, § 50.

<sup>3</sup> 24 & 25 Vic. c. 100, § 16.

<sup>4</sup> 6 & 7 Vic. c. 96, § 3.

<sup>5</sup> 24 & 25 Vic. c. 96, § 46.

<sup>6</sup> 3 Inst. 66.

<sup>7</sup> See the other sections of the same Act, as to other buildings, &c.

or under the Statute, and therefore no negligence or mischance amounts to it.<sup>1</sup> If a man, intending to commit a felony, by accident sets fire to another's house, this it appears would be arson at Common Law and within the Statute:<sup>2</sup> so, if intending to set fire to the house of A, he fires that of B.<sup>3</sup>

**Malicious Injuries to Property.**—The 24 & 25 Vic. c. 97, protects the interests of owners of property by defining numerous offences, and declaring the penalty in each case—*e. g.*, destroying with gunpowder any dwelling house; throwing gunpowder into a house with intent to destroy it; cutting, &c., silk, &c., and goods in the loom; breaking, &c., warp of silk, &c., or marking; destroying thrashing or other machines; drowning a mine; damaging airways of mines; destroying or damaging ships with intent to injure the owner; injuries to turnpike-gates; destroying or cutting trees, hop-binds, &c.; killing or maiming cattle; damaging works of art, &c.

**Forcible Entry and Detainer.**—A forcible entry or detainer is committed by *violently* taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of the law.<sup>4</sup> The indictment must show on the face of it that the entry was with more force than in a common trespass, for which there is only the civil remedy; at least a breach of the peace must appear.<sup>5</sup>

**Burglary** at Common Law is the breaking and entering of the dwelling-house<sup>6</sup> of another in the night time

<sup>1</sup> Steph. Com., vol. iv., p. 182, 3. Inst., p. 67.

<sup>2</sup> See Fost. C. C., p. 258 *et seq.*

<sup>4</sup> 4 Steph. Com. p. 342.

<sup>3</sup> 1 Hale, p. 569.

<sup>5</sup> See 8 T. R., p. 361.

<sup>6</sup> A *dwelling-house* is defined to be a permanent building in which the

with intent to commit a felony therein.<sup>1</sup> *A Burglar* 'is he who in the night breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.'<sup>2</sup> The 24 & 25 Vic. c. 96, s. 51, enacts that—'Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case *break out* of the said dwelling-house in the night, shall be deemed

renter or owner, or his family, dwell and lie. A mere tent or booth, therefore, in a market or fair is not a dwelling-house for the purpose of burglary. It was enacted by 7 & 8 Geo. IV. c. 29, s. 13, 'That no building, although within the same curtilage as the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage, leading from the one to the other.' Evidence of the breaking and entering such a building will support an indictment charging a breaking and entering of a dwelling-house. *Occupation* by any part of the family is sufficient, as by a servant boy only; neither is the temporary absence of the owner and his entire family sufficient to deprive a dwelling-house of the protection of the law as such, provided he had an intention of returning. A *residing* in, or habit of residence, is however necessary to constitute a dwelling-house in which burglary may be committed; using it for meals and purposes of business is not sufficient; neither is a *mere sleeping* by a porter for the protection of goods; or by a servant to watch thieves; or by servants employed in business, not being domestic servants, but merely to take care of the house; or by a servant put into a house by a landlord until relet, he not intending to reside himself. In case of a dwelling-house *divided* into two or more separate dwellings, provided there be no internal communication, each of the separated dwellings is within the definition of a dwelling-house in burglary. *The breaking* must be either actual or constructive. An actual breaking is where, for the purpose of getting admission for any part of his body, or for a weapon or other instrument to effect his felonious attempt, the offender breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unloosening any other fastening to doors or windows. A *breaking* therefore may be by the taking out of the glass from a door; by pulling down the sash of a window kept only in its place by a weight; or by raising a sash-window which was shut down but not fastened.

<sup>1</sup> 3 Inst., p. 63.

<sup>2</sup> 3 Inst., p. 63.

guilty of *burglary*.' Sec. 54—'Whosoever shall enter any dwelling-house in the night,<sup>1</sup> with intent to commit any felony therein, shall be guilty of *felony*.' Sec. 58—'Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night, having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any pick-lock, key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony, or shall be found by night in any dwelling house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor.

**Larceny**<sup>2</sup> (at Common Law) is the unlawful *taking and carrying away of the personal property* of another with the intent feloniously (*animo furandi*) to convert the same to the taker's own use, and permanently to deprive the rightful owner.<sup>3</sup> Larceny is defined by Blackstone to be 'plain theft, unaccompanied with any other atrocious circumstance.'<sup>4</sup> Larceny accompanied with circumstances of aggravation is termed *compound, mixed, or complicated* larceny. The Statute Law of

<sup>1</sup> Sec. 1.—'For the purposes of this Act the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.'

<sup>2</sup> By the 24 & 25 Vic. c. 96, s. 2, the distinction between *Grand* and *Petty* Larceny is abolished. It enacts—'Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the 21st day of June, 1827.'

<sup>3</sup> See 4 Steph. Com., p. 203 *et seq.*

<sup>4</sup> 4 Blac., p. 229.

England and Ireland relating to larceny and other similar offences, is consolidated by 24 and 25 Vic. c. 96.

The goods taken must, in the absence of any express statutable enactment, appear in evidence to be *personal goods*; for none other can be the subject of larceny at Common Law.

Larceny cannot be committed at Common Law of chattels real, or of things attached to or savouring of the realty.<sup>1</sup>

There must not only be a taking, but a carrying away (*cepit et asportavit*); a bare removal, however, from the place in which the thief found the goods is a sufficient asportation, or carrying away, though he did not succeed in making off with them.<sup>2</sup>

<sup>1</sup> *Property*.—Things which are the subjects of property are either *real* or *personal*. *Things real* are those which are permanent and immoveable. They consist of lands and other tenements. The word 'land' includes the surface and substance of the earth, and everything which is permanently fixed or incident to it, such as houses, woods, waters, mines, fossils: *cujus est solum, ejus est usque ad cælum*.

*Things personal* are divided into *chattels (catalla) real* and *chattels personal*. 'Chattels are such things as are not hereditary, but testamentary, as moveable goods, leases for years, wardships of lands and body, and the like: they are called testamentary, as well because, by the course of the Common Law, things only of that nature, and not hereditaments, might be disposed of by will and testament, as also because, after the death of the testator, the law does transfer the same to the executor of his last will and testament for the payment of his debts and legacies; for until a Statute made 32 Henry VIII., hereditaments were not disposable by will, if the testator had therein any greater estate than for years; such hereditaments excepted as were devisable by will, by a special custom, and not by the Common Law.'—Noy, p. 357. *Chattels real* 'are properly such as savour of the realty—viz., consist of such things as are in their nature hereditary, wardships of lands, or of other hereditaments, leases, or interests for years, or at will, derived out of anything whereof an estate of freehold or inheritance has or had a being.'—Noy, p. 358.

*Chattels personal* 'are goods moveable, as goods, plate, money, oxen, kine, &c. Creatures *feræ naturæ*, as deer, conies, hares, and such like, are not goods or chattels, except they are made tame. Any charters or deeds of an estate of inheritance or freehold, although they are moveable, are not chattels.'—Noy, p. 359.

<sup>2</sup> Steph. Com., vol. iv. p. 205.

**Embezzlement.**—The 7 & 8 Geo. IV. c. 29, s. 47, enacts—‘If any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, he shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed.’

The crime of embezzlement by a servant, as distinguished from larceny, consists in its being committed in respect of property which is not, at the time of the wrongful appropriation, in the actual or legal possession of the owner.<sup>1</sup> If the servant received the property and converted it to his own use *before* it came to the possession of the master, the offence is embezzlement; whereas, if the property had come to the possession of the master, and the servant<sup>2</sup> *afterwards* converted it to his own use, it is larceny; the punishment of which

<sup>1</sup> See *R. v. Gill*, 1 Dearsley's C. C. R., p. 289.

<sup>2</sup> *Servants within the meaning of the Act.*—A female servant; an apprentice, though under age; a person employed as accountant and treasurer to the overseers of the poor; a collector of poor and other rates; and in indictments for larceny and embezzlement, a collector, or assistant overseer, shall be described as the servant of the inhabitants of the parish whose money or property he shall be charged with having embezzled or stolen; a clerk to a savings-bank; a steward receiving money for his employers, even though they had no right to it, and were wrongdoers in receiving it; a clerk of a corporation, though not appointed under their common seal; a traveller employed to take orders and collect money, though paid by a *percentage* or share of the profits, and employed by others as well as the prosecutor; a member of and secretary to a society, who withheld money received from another

is regulated by Sec. 46 of the same Act. A verdict for embezzlement may be had on an indictment charging larceny, and *vice versa*.<sup>1</sup>

**Cheating and False Pretences.**—‘Whosoever shall by any false pretence<sup>2</sup> obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor.’<sup>3</sup>

Wherever a person fraudulently represents as an existing fact, that which is not an existing fact, and so gets money, &c., that is an offence within the Act.<sup>4</sup> All

member, it being the duty of the former to pay over the amount to the trustees; a person employed only upon one specific occasion to receive money; a journeyman miller not employed as clerk or accountant, but in the habit of selling small quantities of meal on his master's account; a servant intrusted with the receipt of money from *particular* persons, who received from other persons and embezzled it; have severally been held to be punishable by the Statute. But, in order to render him liable, it is necessary that the money should have been received *in the course of the servant's employment*; as where a debtor of the prisoner's employer paid the prisoner £5, supposing him to be authorized to receive it, which he was not, and the prisoner never accounted for this money; this was held no embezzlement. So in the case of a servant employed to look after goods, but not intrusted with the receipt of money; so also of a butcher's boy whose duty it was to carry out meat, but had never been employed to receive money; and where the prisoner was employed to lead a stallion, with authority to charge and receive a fixed sum, but not less, and he received a less sum and embezzled it, this was held not to be within the Statute, because the money was not received by virtue of his employment.

<sup>1</sup> 24 and 25 Vic., c. 96, s. 72. See Campbell's Acts, by Greaves, p. 68 *et seq.*

<sup>2</sup> It is not necessary that *words* should be used; where a party gave a cheque on a banker with whom he had no account—this was held a false pretence; so where a man obtained goods and money for a forged note of hand for ten shillings and sixpence; so where a man assumed the name of another to whom money was required to be paid by a genuine instrument; so also where a defendant assumed the gown and cap of a member of the University of Oxford, but was not so, and obtained goods by the fraud. But where the prisoner had passed a note of a country bank which he knew had stopped payment, but one of the parties was solvent, it was held he could not be convicted for obtaining money under false pretences.

<sup>3</sup> 24 and 25 Vic., c. 96, s. 88.

<sup>4</sup> Reg. v. Wooley, 1 Den. C. C., p. 559.

cases where the false pretence creates the credit are within the Statute.<sup>1</sup> But a false representation merely as to the *quality* of goods sold or pledged, is not indictable,<sup>2</sup> and is clearly distinguishable from fraudulently representing a spurious article to be the genuine.<sup>3</sup> A pretence that the party *will do* an act notwithstanding that he does not intend to do it, *e.g.*, to pay for goods on delivery, is not a false pretence within the Act, but merely a promise for future conduct.<sup>4</sup> These illustrations will suffice to indicate the scope of the section, and a little reflection will enable the reader to draw the line aimed at by the Legislature, which, though not always easy to track, still necessarily exists between that puffing and promising which unfortunately exists to far too great an extent among tradesmen, but which, however objectionable, is not criminal, and the fraud which it is the aim of the Legislature to suppress.

**Crimes against the Reputation.—Libel** (*written Slander*) may be defined to be the malicious publication of an unlawful defamation, expressed either in printing, writing, picture, or sign.

**MALICE** (*malitia præcogitata*, or *malice prepense* or *aforethought*), or criminal intent, is the formed design of doing harm or mischief to another. Malice, in law, is either *express* or *implied*. The law implies or presumes malice when the natural and obvious tendency of the act is to harm, *res ipsa in se dolum habet*—the facts speak for themselves.<sup>5</sup>

<sup>1</sup> Reg. v. *Witchell*, 2 East P. C., p. 830.

<sup>2</sup> Reg. v. *Bryan*, 1 Dears and B. C. C., p. 265.

<sup>3</sup> Reg. v. *Dundas*, 6 Cox, C. C., 380.

<sup>4</sup> Reg. v. *Goodhall*, R. and R., p. 461.

<sup>5</sup> Answer of the Judges to the House of Lords, 8 Scott, N. R., pp. 595, 601. *Haire v. Wilson*, 9 B. and C., p. 643.

**DEFAMATION** is the use of any words, or the doing of any act, the tendency of which is to expose the person to whom it is applied to public hatred, contempt, or ridicule.

**PUBLICATION.**—The libel is published or *uttered* the moment its author ceases to be the sole possessor of the fact of its existence, or has taken the step necessary to divulge the fact, *e. g.*, parting with or ceasing to have control over it.<sup>1</sup>

**UNLAWFUL.**—The bare fact of the defamatory matter being true does not *privilege* its publication. The 6 & 7 Vic. c. 96, s. 6, enacts that ‘the truth of the matter charged may be enquired into, but shall not amount to a defence *unless it was for the public benefit* that the said matters charged should be published.’ The fact of truth must be specially pleaded.

A libel may be expressed in a direct manner, or indirectly, by hints or modes of expression calculated to convey a given meaning; or obliquely; or by irony; or by way of question, exclamation, or conjecture. A defamatory writing, expressing only one or two letters of a name, is as much a libel as if the name were written in full, when the context identifies the person intended. A libeller, or a publisher of libel, commits a public offence, indictable at Common Law, and whenever an action will lie<sup>2</sup> for libel or slander without laying special damage, an indictment is sustainable for the writing. So, where a person is indictable for a written publication, an action is also maintainable at the suit of the party injured.

Whenever an action<sup>3</sup> will lie for *verbal slander*, with-

<sup>1</sup> *Griffiths v. Lewis*, 7 Q. B., p. 61.

<sup>2</sup> An action will lie without laying special damages for—1. Words *spoken* of another which impute to him the commission of an offence punishable by law. 2. Words *spoken* which may have the effect of

out laying special damage, an indictment will lie for the same words, if reduced to writing and published.

No indictment will lie for mere words not reduced into writing, unless they are seditious, blasphemous, grossly immoral, or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge.

Sending a libellous *letter* to the party libelled is a good ground for an indictment, though not for an action.<sup>1</sup>

It is the duty of the judge to direct the jury as to what constitutes defamation in law; it is that of the jury, acting under such direction, to say whether the matter in question is defamatory.

**Common Nuisance.**—A public or common nuisance is such an inconvenient or troublesome offence as annoys the community *in general*, and not merely some particular person; as such, it is indictable and not actionable.<sup>2</sup> An indictment will not lie for a nuisance to a few individuals of a particular place only.<sup>3</sup> A nuisance may arise either from doing, or neglecting to do, that which the common good requires;<sup>4</sup> and if the thing complained of be likely to produce an injury, it is sufficient.<sup>5</sup> If a person indicted for a nuisance continues the same, he may be again indicted for the con-

excluding him from society, *e. g.*, charging him with *having* an infectious disease. 3. Words *spoken*, imputing misconduct or want of skill, calculated to hurt his trade or livelihood, *e. g.*, to call a tradesman a bankrupt, a physician a quack. 4. Words *spoken*, imputing misconduct in the discharge of a public office. 5. Written slander, when the words used are actionable in themselves. See Bullen and Leake, *Precedents of Pleadings*, p. 302.

<sup>1</sup> Wm. Sand. 1. 160, *n. (m)*.

<sup>3</sup> Lloyd's Case, 4 Esp., p. 200.

<sup>5</sup> Vantandillo's Case, 4 M. & S., p. 73.

<sup>2</sup> 1 Hawk., bk. 1, c. 32, s. 4.

<sup>4</sup> 1 Hawk., bk. 1, c. 32, s. 4.

tinnance.<sup>1</sup> All common nuisances are misdemeanors, and punishable at Common Law; many, however, of the more objectionable or frequent have been made the subjects of express legislation.<sup>2</sup> As examples of common nuisances, the following may be adduced:—Obstructing or omitting to repair highways and bridges; the carrying on of dangerous or offensive businesses; exposing in a public thoroughfare a person infected with a contagious disease, keeping disorderly inns, bawdy houses, gaming houses, unlicensed booths and stages for rope dancers, &c.; lotteries; making or having too large a quantity of gunpowder at one time; eaves-dropping, or the offence committed by such as loiter under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales;<sup>3</sup> making candles in a town by boiling stinking stuff, so as to annoy the whole neighbourhood.<sup>4</sup>

<sup>1</sup> See 1 Lord Raym. p. 370.

<sup>2</sup> See Appendix.

<sup>3</sup> Steph. Com., vol. 4, p. 357.

<sup>4</sup> Nuisances occasioned by steam-engines are regulated by statute. Whether the number of persons annoyed is sufficient to render the matter a public nuisance, is a fact to be judged of by a jury. No length of time will legitimize a nuisance: though twenty years' use may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of longer standing. It is against law to prescribe for a nuisance. It is now settled that it is no answer to an indictment for a nuisance, that upon the whole it furnishes a greater convenience to the public than it takes away. A party may be guilty of a nuisance by the act of his servant or agent, where such agent acts under a general authority to manage the works complained of, though personally ignorant of the particular plans adopted, and though such plans be a departure from the original and understood method, which the principal had no reason to suppose discontinued. So may the owner of land let to a tenant, on which a building is erected which is a nuisance, or of which the occupation is likely to become a nuisance, be liable to an indictment for such nuisance being continued or created during the term. As to when buildings are to be deemed common nuisances, see 14 Geo. III. c. 78, §§ 58, 60.

An indictment at Common Law may be maintained for any offence

**Duties and Rights incident to the maintenance of Security in the immediate future.**—In order that the State and its individual members may not only *be*, but *continue to be*, in a condition satisfactory to both, it is essential that each individual should do two things; 1, support himself; and 2, contribute to the support of the State. In order that he may be able to support himself, not being a capitalist,—he must *labour*, and by his labour obtain not merely sufficient to gratify the wants of the moment, but to provide the surplus necessary to meet two exigencies, viz.,—(1) the contribution that it is his duty to make toward the maintenance of the State, and (2) the treasure upon which he can draw (a) in the event of any temporary necessity not met by the fruits of his day's labour, (b) when inability to labour renders him incapable of providing, day by day, his daily necessities. These two duties may therefore be termed the *Duty of self-support* and the *Duty of allegiance*. Nothing is more obvious than the fact that if each discharges the first duty, his pecuniary obligation under the second must, except in the event of a war, be merely nominal. The question of self-support is therefore one of vital interest. In importance it ranks second to none. It lies at the very root of national prosperity, whether physical,

which is against public morals or decency. Under this head may be comprehended every species of representation, whether by writing, by painting, or by any manner of sign or substitute which is indecent and contrary to public order. The principle of the cases seems also to include the representation of obscene plays, an offence which has formed the ground of many prosecutions. By the Vagrant Act, 5 Geo. IV., c. 83, any person wilfully exposing to view, in any street, etc., any obscene print, picture, or other exhibition, is liable, on conviction before a Justice, to three months' imprisonment with hard labour; and by 1 & 2 Vic., c. 38, § 2, exposing obscene prints in shop windows is within the above statute.

pecuniary, moral, or religious. It is therefore the subject above all others concerning which false notions are dangerous. The space, however, at our disposal admits only of a few observations upon it.

The attempt not merely to state the elements of the existing Public Law of England, but to expound, in a systematic manner, the principles upon which that law rests and proceeds, necessarily involves some criticism upon those departments that appear defective in principle, or, in other words, inconsistent with the rest of the system. Bearing in mind the fact that our laws are the laws of a people famous from their earliest history, not merely for the love of freedom, but for an irrepressible determination to have and to enjoy it, the impartial student of our laws will not be surprised should he meet with instances of apparently insufficient barriers to prevent liberty crossing the narrow line by which it is separated from license. The most conspicuous cases of this kind are,—(1) The absence of restraint upon marriage; (2) The absence of coercion upon parents to properly educate and instruct their children; (3) The absence of any guard against indiscriminate alms-giving, whereby the well-intentioned but unwise pauperise the souls and make idle the hands of their less wealthy neighbours; (4) The absence of check upon the immigration of criminal, pauper, or out-cast foreigners, who no less surely poison the morals than eat up the bread of our own citizens.

It is, however, gratifying to observe that to each of these questions, together with others of a kindred nature, public attention has, within the last few years, been more or less actively directed; and an evident change of sentiment is beginning to be exhibited, pro-

mising a new era. It must not be forgotten that the House of Commons is the body of gentlemen elected by the people to represent the people in Parliament, and that each Member, when speaking or voting upon a question before the House, is presumably expressing the sentiment of his constituents. Consequently the opinion of the majority of the Members must be taken to be that of the majority of the nation; and as the nation entertains a broad and comprehensive or a narrow and mean view of any subject, the House merely gives to that view expression and effect.

**Self-support—Industry.**—*Labour, Trade, Commerce.*  
—Being told that it is the duty of each individual to be self-supporting, we naturally ask, How is he to become so? In order to be able to realize all that is involved in this duty and question—we must, in the first place, distinguish two totally different conditions—(1) A State composed of but few people, yet occupying a large territory; (2) The same State, with the same territory, but possessing a large population. Thus the area of England is 32,590,397 statute acres. It is, of course, the same now as it was at the time of the Norman Conquest, *i.e.* in 1066. The population at that date was 2,000,000; in 1871, it was 21,487,688; or, in other words, the present population of England is more than ten and a-half times larger than it then was. If, then, we divide the area by the population, we have in round numbers this result. In 1066, there were 16 acres to each individual; in 1872, there is only  $1\frac{1}{2}$ . Reflecting upon this fact, we see that the industry by which the individual members of the State must render themselves self-supporting, must, in proportion as the population increases, assume different forms; for the primi-

tive forms of labour, the cultivation of the soil, the chase, fishing, the building of habitations, the manufacture of clothing, and the implements necessary to these several occupations, could not possibly occupy the time, much less could they so occupy it as to make the labour of 21,000,000 persons, or of that portion of the 21,000,000 who are capable of working, self-supporting. How then is the labour necessary for this vast number to be provided? The answer appears to be, By the possession of capital. What then is capital, and in what way does it advantage a State? Capital may be defined to be *treasure represented by its market value*; and treasure may be defined to be the *surplus fruit of labour*, or that portion of the produce of labour not consumed to satisfy the wants, real or imaginary, of the labourer. The treasure or capital of the State, or of an individual, therefore corresponds exactly with the relation of its satisfied wants to its product of industry. Admitting this explanation of the fact and origin of capital to be correct, we proceed to enquire in what way the existence of capital brings into existence novel branches of self-supporting labour. Let us assume, (1) a miniature State, its *territory* 100 square acres, its *population* 10 persons, A. and B. man and wife; C. and D. man and wife; and E. and F. man and wife; G. H. I. and J. single persons: its *wants* three—food, clothing, and lodging. (2), that A. can and does provide all the food, C. all the clothing, and E. all the lodging required for the ten. The wife of each may be said, from the State point of view, to be self-supporting, she being identified with her husband. There are therefore four, each of whom is in one of two positions, he or she is either dependent upon A., C., and E., for

support, in which case he or she is a burden, or possesses something that can be given by way of equivalent or return for what he or she receives from A., C., and E. respectively. Assuming that J. only has this equivalent—treasure, capital, money, or call it what we please—and that he possesses it in abundance. This results: A., C., and E., by their labour, not merely satisfy their own and the three wants of the rest, but they become possessed of a portion of J.'s capital, or, in other words, they become capitalists. Again, J., possessing this capital, is in a position to say to G., H., and I., if you will do so-and-so for me, I will pay you for your time or work; and by doing the thing required—and it is immaterial what that may be, provided it is consistent with the morality of the community—G., H., and I. also become possessed of a portion of J.'s capital, and in the position to recompense A., C., and E. for the food, clothing, and lodging they supply. The occupations of G., H., and I. thus become new branches of productive labour. Without further expanding this illustration, we may take it to have sufficiently established two facts,—1, that the capitalist is the great friend of the labouring classes, in fact that it is mainly by virtue of his existence that they are enabled to live; and 2, that every species of luxury and sumptuousness indulged in by those who have the means to secure them is a positive benefit to the State, inasmuch as it gives remunerative employment to those who require it, and who could not otherwise subsist by their own labour.

That every encouragement is to be given to industry, and every obstacle removed out of the way of trade and commerce, has long been a prominent fea-

ture of our public policy. Its wisdom is manifest by the fact, that in wealth and enterprise England is second to no country in the world. Indeed, so jealous is our law of all that can even threaten to imperil industry, that conspicuously among the very few instances where it curtails the free exercise by private individuals of the right to enter into what contracts they please, it distinctly declares that no man shall have a monopoly of any trade, and that any bond, covenant, or agreement in restraint of trade *generally*, is void. In the leading case upon this point, *Mitchell v. Reynolds*,<sup>1</sup> Lord Macclesfield lays down the following eight propositions :—

1. That to obtain the *sole* exercise of any *known trade* throughout England, is a complete monopoly, and against the policy of the Law.

2. That when restrained to particular places or persons (if lawfully and fairly obtained), the same is not a monopoly.

3. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely and in itself unlawful.

4. That it is lawful, upon good consideration, for a man to part with his trade.

5. That since actions upon the case are actions *injuriarum*, it has been always held that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it *injuriously*.

6. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7. That no man can contract not to use his trade at all.

<sup>1</sup> See Smith's Leading Cases, vol. i. p. 360.

8. That a *particular* restraint is not good without *just reason and consideration*.

For the same reason attempts to create *perpetuities*<sup>1</sup> are never permitted by the law to succeed, on account of the tendency of such limitations to paralyse trade, by shackling property and preventing its free circulation for the purposes of commerce: for trade consists in the free application of labour to the free circulation of property,

<sup>1</sup> 'Executory devise was not regularly admitted till about two centuries ago. The rules for circumscribing it are consequently not of earlier date; and there are not any Statutes for the purpose. It is impossible, therefore, that the rules should be derived from any other source than the discretion of the Judges. For general utility and public convenience they permitted executory devise. But it was seen, that if executory devise, or use or trust of a similar nature, was permitted without some restrictions, great abuses might be generated. It was soon settled by the Courts of Law, that executory devise could not be barred by common recovery (see Joshua Williams, *Law of Real Property*, p. 43), that is, as early as the case of Pells and Brown in 17 James I. Afterwards, though not without much contest, it was further settled, that executory devise might be so shaped as to make the devisee uncertain (see the Case of *Snowe v. Cuttler*, 1 Eq. Abr. p. 188, c. 10), till the very instant appointed for rising of the executory estate. But executory devise, thus unbarrable by recovery or otherwise, and thus uncertain as to the person of the devisee till the moment of taking effect, if some limit had not been prescribed, would have been a shelter for perpetuity. To prevent such an abuse, the Judges limited the time for the contingency on which an executory devise was to operate; holding that unless the contingency was such, that if it ever happened, it would necessarily happen within a limited space of time, the executory devise should be deemed illegal, and considered as a nullity. Thus as for the sake of general utility the Judges exercised a discretion in permitting executory devise to be introduced; so to prevent public inconvenience, they limited the time for the contingency, and proscribed all contingencies exceeding that time as too remote, and therefore against law. The Courts of Equity followed the Courts of Law in this, and circumscribed trusts of the nature of executory devise in like manner. Hence gradually arose the boundary which now circumscribes executory devises, and limitations and trusts of the same nature; namely, the rule confining the contingency for the springing up of future and executory estates to the compass of a *life or lives in being, and twenty-one years after, including a certain number of months for the birth of a child en ventre sa mere*.'—Hargrave's *Juridical Arguments*, &c., vol. ii. p. 28; the Second Argument in the *Thellusson Causes*.

and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other. This doctrine of *perpetuities*, as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim which is recognised by our earliest writers; viz., that *property has certain inseparable incidents, among which is the right of aliening it by the assurances appropriated by the law to that purpose, of which incidents it cannot be deprived by any private disposition*.<sup>1</sup>

The distinction between *trade* and *commerce* is this,—trade is our mutual business dealings at home; commerce our dealings with foreign nations, our colonies, &c.

The affairs of commerce are regulated by the Law Merchant, *Lex Mercatoria*, or Commercial Law. ‘Lord Mansfield,’<sup>2</sup> said Mr. Justice Buller, in the Case of *Lickbarrow v. Mason*,<sup>3</sup> ‘may be truly said to be the founder of the commercial law of this country. . . . We all know that from his time the great study has been to find out some certain general principles which shall be known to all mankind, to rule not only one particular case, but to serve as a guide to the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding.’<sup>4</sup>

**Monopoly.**—A monopoly is defined to be an institution or allowance by the King, by his grant, commis-

<sup>1</sup> Smith's Leading Cases, vol. i. p. 378.

<sup>2</sup> (Wm. Murray) Lord Chief Justice of the King's Bench from 1744 to 1788.

<sup>3</sup> 2 T. R., p. 73.

<sup>4</sup> See the Mercantile Law Amendment Act, 19 and 20 Vic. c. 97; and the Merchandise Marks Act, 25 and 26 Vic. c. 88.

sion or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or are hindered in their lawful trade.<sup>1</sup>

By 21 Jac. I. c. 3, s. 1, it is enacted, 'That all monopolies and all commissions, grants, licenses, charters, and letters patent, heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, for the sole buying, selling, making, working, or using of anything within this realm or the dominion of Wales . . . . are altogether contrary to the laws of this realm, and so are and shall be utterly void, and of none effect, and in no wise to be put in ure or execution.' The wisdom which dictated the abolition of monopolies recognised the distinction between giving any individual or particular individuals the sole right of making or selling any *known article*, and giving to an inventor or discoverer the *just fruits of his labour*; viz., the sole right during a given time of making and selling the *novelty* to which by his industry and ingenuity he has given birth, whether the subject of Patent or of Copyright; hence—

**Patents.**—By the 21 Jac. I. c. 3, s. 6, it is enacted, 'Provided also, that any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of *new manufactures* within this realm, to the *true and first inventor* and inventors of such

<sup>1</sup> 3 Inst., p. 181.

manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient.' As it may possibly occur that the inventor, who has obtained his letters patent under the provisions of this Act, may not, during the fourteen years he is so protected, derive substantial reward from his invention, owing, for example, to the cost or labour attending the invention having being very great, and a tardy appreciation by the public of its merits, he is empowered by the 5 and 6 Will. IV. c. 83, to petition the Crown for an extension of his privilege, which petition—he having observed the forms required by the Act—may be referred by the Crown to the Judicial Committee of the Privy Council, in which case it is provided, Sec. 4, 'Whereupon, and upon hearing and enquiring of the whole matter, the Judicial Committee may report to His Majesty that a further extension of the term in the said letters patent should be granted, not exceeding seven years . . . provided that no such extension shall be granted, if the application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent.' See also 2 and 3 Vic. c. 67; 7 and 8 Vic. c. 69; 15 and 16 Vic. c. 83; 16 and 17 Vic. c. 5; 16 and 17 Vic. c. 115; 22 Vic. c. 13, and 33 and 34 Vic. c. 27.<sup>1</sup>

**Copyright.**<sup>2</sup>—Copyright is the exclusive right of

<sup>1</sup> For further information upon this subject, see Hindmarch on Norman on Patents.

<sup>2</sup> 'The sole right of originally giving to the world the results of his mental labours, and the power to hinder the infringement by others of

multiplying copies of an original work or composition, and consequently of preventing others from doing so. It is a right which cannot be divided.<sup>1</sup> By 5 and 6 Vic. c. 45, the copyright of every book published in the life-time of its author endures for his life, and for seven years longer, or (if the seven years shall expire before the end of forty-two years from the publication, for forty-two years; if the work is posthumous, the copyright endures for forty-two years from the publication, and belongs to the proprietor of the manuscript. The title of the work must be entered at Stationer's Hall. A copyright is assignable by an instrument in writing, which does not require to be under seal. The sole liberty of printing and publishing lectures is secured to lecturers by 5 and 6 Will. IV. c. 65; dramatic and musical compositions and performances are protected by 3 and 4 Will. IV. c. 15, and 5 and 6 Vic. c. 45, ss. 20, 21; engravings and prints, by 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 and 7 Will. IV. c. 59; and 10 and 11 Vic. c. 95; sculptures, models, copies and casts, by 38 Geo. III. c. 71, and 54 Geo. III. c. 56; and designs for articles, whether of ornament or utility, by

his property therein, are guaranteed to every British subject by law, *so far as law can accomplish that object*. . . . Our law takes no cognisance of any claims to the ownership of ideas which have not found a material clothing, and refuses to preserve the most original of men from the annoyance of having published abroad, either by writing or by word of mouth, his most original ideas, which have been communicated to another in the course of conversation. . . . The intangible and incorporeal products of his mind, so long as they remain in that condition, are beyond the protection of law; when reduced into any material form, which can be produced in a court of justice, or be identified by proofs of a satisfactory kind, the author's right to them (called copyright) becomes enforceable by law.'—Shortt's Law relating to Works of Literature and Art, p. 1.

<sup>1</sup> Lord St. Leonards, in *Jefferys v. Boosey*, 4 H. L. Cases, p. 815.

5 and 6 Vic. c. 100; amended by 21 and 22 Vic. c. 70; 6 and 7 Vic. c. 65; 13 and 14 Vic. c. 104; 14 and 15 Vic. c. 8; 15 and 16 Vic. c. 6; and 25 and 26 Vic. c. 68.<sup>1</sup>

**Economy** (*Frugality, Discretion of Expense*).—We now come to the second element of self-support, *economy*, upon which it is quite unnecessary to enlarge; every Englishman having but too frequently forced upon his attention the most painful examples of the desolation and misery produced by the want of discretion in business, and the foolish affectation of the habits and manners of those of more ample means than their silly mimics. We fail to discover a difference in principle between the citizen who renders himself non-self-supporting by indolence, and him who renders himself non-self-supporting by the indulgence of his passion for speculation, show, or his stomach. We appear to be justified in saying that bankrupts, vagrants, and paupers are three species of the genus *profligates*. As it is however *possible* that the most discreet in business may become bankrupt, that the most virtuous may become a pauper, and that there may be instances of vagrants who are entitled to pity, our Legislature has in its clemency extended the benefits of the doubt to its very widest limit.

**Bankruptcy.**—The Bankruptcy and Insolvency Act of 1869 (32 and 33 Vict. c. 71) contains three methods by which a person in pecuniary embarrassment may be relieved: 1, By Adjudication in Bankruptcy; 2, by Liquidation by Arrangement; and 3, by Composition with Creditors.

*Adjudication in Bankruptcy.*—By sec. 6, it is enacted

<sup>1</sup> Shortt's Law relating to works of Literature and Art.

that 'a single creditor, or two or more creditors, if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the Court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression "acts of bankruptcy :"

'1. That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :

'2. That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof :

'3. That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England ; or being a trader departed from his dwelling house, or otherwise absented himself ; or begun to keep house ; or suffered himself to be outlawed :

'4. That the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts :

'5. That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods :

'6. That the creditor presenting the petition has served in the prescribed manner on the debtor a

debtor's summons requiring the debtor to pay a sum due, of any amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same.

'But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication; moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value.'

By sec. 11, the bankruptcy is made to have relation back to and to commence from the time of the act of bankruptcy being completed, on which the order of adjudication is made. The effect of the order of adjudication is:—(1), by sec. 17, immediately to vest the whole property of the bankrupt in the registrar as trustee, in whom it remains vested till appointment by

the creditors, or committee of inspection of a trustee of their own selection under the powers given them by the 14th sec. (2), by sec. 12, to deprive all the bankrupt's creditors, except secured creditors, of all other remedy against the property or person of the bankrupt in respect of all debts provable in the bankruptcy. (3), by sec. 14, to make the property<sup>1</sup> of the bankrupt divisible amongst his creditors in the proportion of the debts proved by them in the bankruptcy. (4), by sec. 14, to give to the creditors the power to appoint a *trustee* as already mentioned, and a *committee of inspection* for the purpose of superintending the administration by the trustee of the bankrupt's property. By sections 26 and 27, great discretionary latitude is given to the trustee and committee as to the management and disposal of the estate; and by sec. 28, the trustee, with the sanction of a special resolution of the creditors at a meeting properly convened, may *accept any composition* offered by the bankrupt, or assent to any proposed scheme of settlement, subject to the approval of the court. By sec. 44, it is enacted that when the trustee has converted into money all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the bankruptcy, he shall declare a *final dividend*, and give notice of the time at which it will be distributed, of which (sec. 47) the trustee shall report to the court, whereupon the court, if satisfied, shall make an order that the bankruptcy has closed. By sec. 48, the bankrupt is permitted to apply to the court for an order of

<sup>1</sup> That excepted which is specified in the 15th section, and that on which secured creditors have a lien. See secs. 12, 16, 40.

discharge, the effect of which, when granted, is, by sec. 49, to release the bankrupt (in the absence of fraud or breach of trust on his part) from all debts proveable under the bankruptcy, except—(1) debts due to the Crown; (2) debts with which the bankrupt stands charged at the suit of the Crown, or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence.

*Liquidation by Arrangement.*—By sec. 125, it is provided that a debtor unable to pay his debts, may summon a general meeting of his creditors, which meeting may, by a special resolution, declare that the affairs of the debtor are to be liquidated by arrangement, and not in bankruptcy. The meeting is empowered to appoint a trustee with or without a committee of inspection. The Registrar, upon being satisfied that this resolution has been passed in the manner directed by the section, and that a trustee has been appointed, is required to register the resolution with the statement of assets and debts furnished by the debtor to the meeting, whereupon his property vests and becomes divisible as in the case of an adjudication. The same powers are given to the trustee, and like effect to the registrar's certificate. The close of the liquidation may be fixed, and the discharge of the debtor and release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time, and in such manner, and upon such terms and conditions as the creditors think fit.

The trustee is required to report to the registrar the discharge of the debtor. The registrar's certificate of such discharge has the same effect as the order of discharge in the former case.

*Composition with Creditors.*—Upon proper notice given, calling together all the creditors of a debtor, it is made lawful by the 126th sec. for a majority in number and three-fourths in value of the creditors assembled to pass an *extraordinary resolution*, accepting a composition in satisfaction of the debts due to them from the debtor, which, if confirmed at a second meeting (summoned, as is required by the statute) by a like majority, and accepted by the registrar as regular, and together with the statement of the debtor's assets and debts registered by him, such resolution passed, confirmed, and registered, is made binding on all the creditors whose names and addresses, together with the amount of the debts due to each, are shown in the statement of the debtor produced to the meetings at which the resolution was passed. It does not affect or prejudice the rights of any other creditors. In the absence of fraud, proof of the registration, and of the creditor's name having been inserted in the statement of liabilities, is conclusive evidence that in this, as in the case of liquidation by arrangement, the requirements of the Act have been complied with. The reader is referred to the Act for its details, as also to the 32 and 33 Vict. c. 62, abolishing imprisonment for debt for the excepted cases, and saving power of committal for small debts, &c.

**Poor Laws.**—Till the time of Henry VIII., the poor of England subsisted entirely upon private benevolence,

and the charity of well-disposed Christians.<sup>1</sup> The present Poor Law system is generally said to have had its foundation in the 43 Eliz. c. 2, which provides, 'That the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter-week, or within, &c. . . . shall be called overseers of the poor of the same parish; and they, or the greater part of them, shall take order from time to time, by and with the consent of two or more justices of the peace, *for setting to work of the children* of all such whose parents shall not, by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children: and also *for setting to work all such persons, married or unmarried*, having no means to maintain them, as use no ordinary and daily trade of life to get their living by; and also to raise weekly, or otherwise, by taxation, . . . such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, *to set the poor on work; and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work*, and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the same parish, and to do and execute all other things as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient.'

Various charges were from time to time made in the

<sup>1</sup> See 3 Reeves, p. 258.

administration of the Poor Laws, when at length, by the 10 & 11 Vic. c. 109, a Board of Commissioners was appointed, now called the Poor Law Board, since which about forty Acts have been passed upon the subject. The present result is that we have in England 1,081,926 paupers, supported in 1871 at a cost to the nation of more than £10,000,000.

**Vagrancy.**—Under the general head *Vagrancy* are classed a variety of offences against the public economy; *e. g.*, neglect to maintain oneself or family, begging, riotous and indecent conduct of prostitutes, fortune-telling, lodging in barns and out-houses, exposing obscene prints, &c. These and numerous kindred acts are made offences by the 5 Geo. IV. c. 83, amended by 1 & 2 Vic. c. 38. By this Act offenders are divided into three classes; 1st, Idle and disorderly persons; 2nd, Rogues and vagabonds; 3rd, Incurable rogues. The first are liable to one month's imprisonment with hard labour; the second, to three months with hard labour; and the third, to one year with hard labour and whipping, except in the case of females.

By 5 Geo. IV. cap. 83, s. 3, it is enacted 'That every person being able, wholly or in part, to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place . . . and every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do, shall be deemed an idle and disorderly

person within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding one calendar month.' The systematic neglect, not to say contempt, of this wholesome enactment must be ascribable to certain notions that appear to have gained possession of the public mind. The wisdom of the enactment, and the fallacy of these notions, become, however, abundantly clear when we abandon sentimentality, and listen to the dictates of reason. Whatever may have been the origin of any given State, whatever may be the actual condition of that State as to the number or wealth of its components, its existence as a State must depend upon its power—1, to keep that number and wealth to itself, and, 2, within itself, as to each individual, to make him and his secure. These two conditions fulfilled, the necessity of the immediate present is satisfied. What that immediate present is, that is thus satisfied, must be determined by the number and extent of the wants of the community and the existing means of meeting those wants. Every hour, therefore, that those wants last, and are gratified from the existing means, those means are decreasing; and, however ample they may be at the moment when those wants begin to draw upon them, a time must come when the wants will exist without the means to satisfy them. It is therefore obvious that the two necessities of *being* must be supplemented, in order to ensure the *continuing* of being, even in the immediate future. In other words, every community has a given

amount of work that must be done by itself—1, for the maintenance of each individual ; 2, for the maintenance of the State as a separate individual, the aggregate of all the individuals. Now, whether human beings unite and form themselves into political societies as the result of their natural gregarious tendency, or for the purposes of mutual support and security against externals, or from experience of the fact that by a peculiar division of labour the wants of each are more easily and more amply supplied ; it is clear that the union, be the motive of union what it may, necessitates not merely a division of labour, but a division regulated by the natural or acquired capacity of each individual ; for, speaking generally, it is according to his capacity that each takes his rank or position in the community, or, in other words, has assigned to him that portion of the common labour which constitutes his duty. A union based on the division of labour demands the labour of each, and non-producing members must subsist, if at all, either upon capital, the surplus fruit of the labour of their predecessors, or by the mis-appropriation of the treasure of the productive members. Now, to deprive the productive members of their treasure, is to render them unproductive ; and by taking from them the natural reward of labour, to violate the principle or contract upon which they entered the community. One who takes from the common treasure more than he contributes to it is called a pauper. His act is an obvious evil to the State ; and it is equally obvious that this evil can only be supported within certain limits, for it is an evil which is supported solely by virtue of the industry, economy, and capital of others. There could not be any paupers, if there was no surplus fruit of labour ;

and in that case those who would not or could not support themselves must perish, in obedience to the law of God, distinctly taught both by nature and the Scriptures, in the Old Testament<sup>1</sup> and in the New.<sup>2</sup> A distinction must however be drawn between *voluntary* and *involuntary* paupers; such are the sick, the blind, and the aged infirm, whose days have outrun their little savings for the time of need, for these may be regarded as nature's charge upon and appeal to man's humanity. Under no circumstances should they be placed in a position of degradation, or subjected to contact with the voluntary pauper, who should not only be ranked, as he is by the law, as a *rogue* and *vagabond*, but should be regarded by every virtuous member of the community as among the worst of criminals, his crime having no extenuation of necessity or impulse.

**Allegiance.**—It has been shown in the chapter on the development of the British Constitution, that although the sovereignty of this Empire is lodged by the Constitution in the Parliament, or tripartite body of Queen, Lords, and Commons, all the attributes of sovereignty are vested in the Crown, who is, so to speak, the embodiment or personal exponent of British Majesty. It is to Her Majesty, therefore, that the allegiance of every British subject is due, and it is to her

<sup>1</sup> 'In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken; for dust thou art, and unto dust shalt thou return.' (Genesis, chap. iii. ver. 19.)

<sup>2</sup> 'But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel.' (1 Tim., chap. v., ver. 8.) 'For, even when we were with you,' says Paul, 'this we commanded you, that if any would not work, neither should he eat.' (2 Thess., chap. iii., ver. 10.) 'Neither did we eat any man's bread for nought; but wrought with labour and travail night and day, that we might not be chargeable to any of you.' (Ib., ver. 8.)

that the oath of allegiance<sup>1</sup> must be taken. By this *oath*, or in the case of Quakers *affirmation*, the subject binds himself to be faithful, and bear true allegiance to Her Majesty, and promises to the utmost of his power to protect her person, crown and dignity. This, in brief, is the duty of every British subject, a duty in no way enhanced by the mere fact of taking the oath or making the affirmation. The duty of allegiance may therefore be said to involve the duty of rendering to Her Majesty that physical, moral, and pecuniary support which the maintenance of her dignity requires. We will therefore consider these three several duties in succession.

**Military Law.**<sup>2</sup>—The term Military Law is here used to express the entire body of rules by which the belligerent portion of the State is regulated. It therefore embraces the law regulating the Standing Army, the Navy, the Militia, the Yeomanry, and the Volunteers.

<sup>1</sup> By the 21 and 22 Vic. c. 48, the following form of oath of allegiance is given:—‘I, A. B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts whatever, which shall be made against her person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to Her Majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the Crown, which succession, by an Act entitled “An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,” is and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body being Protestants, hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm; and I do declare that no foreign prince, person, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. And I make this declaration upon the true faith of a Christian. So help me God.’

The form of *affirmation* to be taken by Quakers, &c., is given by 22 Vic. c. 10.

<sup>2</sup> See Martial Law, *post*, p. 443.

One of the primary objects of civil union being the resistance of force by force, or the maintenance of the independence of the civil society by the combined strength of its individual members, it is obvious that, necessity demanding, every citizen, capable of so doing, is bound to take arms in defence of the Commonwealth. It would, therefore, appear but rational that every male citizen should from boyhood be so trained as to be competent to discharge this duty, should it by any unhappy accident become necessary. In ages and countries where war has been more or less the rule, and peace the exception, we invariably find the profession of arms assiduously followed, highly and justly honoured. In the 14th century an agent of destruction was introduced on the battle-field which was destined to entirely revolutionise the art of war; that agent was gunpowder.

In the 15th century, Charles VII. of France introduced (1445) the system, now almost universal throughout Europe,—that of a standing army. It was not, however, till the restoration of Charles II., in 1660, that a standing army was maintained in this country. Inseparably connected with the introduction of a standing army, is the idea of the *professional* soldier. From that period the notion that it is the duty of every citizen to be a soldier, of every soldier to be a citizen, ceased. The two classes became to be regarded as distinct. The rules by which they are respectively regulated are different. The Mutiny Act, however, by which the Sovereign of England is empowered to make articles of war to regulate the conduct of the army, of which all judges are bound to take judicial notice, expressly provides that ‘nothing therein

contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law; and that where he is accused of any offence against a subject of the realm, punishable by the known laws of the land, he shall be delivered over to the civil magistrate; and, moreover, that no person shall, by such Articles of War, be subjected to suffer any punishment extending to life or limb, or to be kept in penal servitude, for any crime which is not expressed to be so punishable by the Act itself; nor shall be punished in any manner, or under any regulation, which shall not accord with its provisions.<sup>1</sup>

The scope of this work does not permit of any detailed account of this important branch of our law, which, though a portion of public law, is so essentially sectional as to be of minor importance to the general reader. I shall consequently content myself with making the few following general observations.

The prerogative of enlisting, and the control of the army and navy of England, is lodged, by the 13 Car. II. c. 6, in the Crown.

Every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign.<sup>2</sup>

The fact of the existence of either the army or navy depends, however, as has already been explained,<sup>3</sup> upon the will of Parliament.

**The Militia.**—In addition to the military force secured by the feudal military tenures, abolished upon the accession of Charles II.,<sup>4</sup> we find, from the earliest

<sup>1</sup> See 26 and 27 Vic. c. 8; Steph. Com., vol. ii. p. 612.

<sup>2</sup> Cockburn, C. J., in re Mansergh, 30 L. J. Q. B., p. 296.

<sup>3</sup> Page 183.

<sup>4</sup> See p. 177.

periods, mention in our records of the Militia, which may with propriety be termed our *county* military; for the force belonging to each county was and is distinct; it is raised in the county, consists of officers and men of the county, is maintained at the cost of the county for the preservation of the peace and security of the county, and can only under special circumstances, such as an invasion, or actual rebellion in the realm, be compelled to serve out of the county. The Militia are in no case compellable to serve out of the kingdom, except, of course, by special Act of Parliament.

Upon the Restoration, the Militia was re-organised, and placed substantially upon its present basis. The more modern Acts affecting it are 13 Car. II., st. 1. c. 6; 13 and 14 Car. II. c. 3; 15 Car. II. c. 4, consolidated by 42 Geo. III. c. 90; 51 Geo. III. c. 118; 15 and 16 Vic. c. 50; 17 and 18 Vic. c. 13, c. 105; 18 and 19 Vic. c. 1, c. 57, c. 100, c. 106, c. 123; 19 and 20 Vic. c. 52, c. 90; 20 and 21 Vic. c. 65, c. 82; 22 and 23 Vic. c. 38; 23 and 24 Vic. c. 94, c. 120, c. 133; 24 and 25 Vic. c. 119; 25 and 26 Vic. c. 80.

For the last quarter of a century, the Militia force, whenever called out, has been sufficiently supplied with volunteers, without recourse being had to the compulsory process formerly adopted of 'ballot.' The term of service is five years. The Militia regiments are officered by the lord-lieutenant, the deputy-lieutenant, and subordinate officers under a commission from the Crown. Officers below the rank of captain do not require any property qualification.<sup>1</sup> They are exercised at stated times; and their discipline in general is liberal and

<sup>1</sup> 15 and 16 Vic. c. 50, ss. 2, 3.

easy ; but when drawn out into actual service, they are subject to the rigour of the Mutiny Act, and the Articles of War. They are entitled to pay while on service, and during the period of training.

**The Standing Army.**—An annual Act—The Mutiny Act—of Parliament is passed, authorizing the maintenance of such regular forces as are deemed necessary for the time being. The paid forces at present consist of 145,450 men, exclusive of the Indian force. The sum granted by Parliament for the maintenance of the army for the year 1871, was £15,851,700.

The Mutiny Act authorizes the making and enforcing of Articles of War. Both the Mutiny Act and the Articles of War are published annually. For the purpose of enforcing the necessary discipline, the Act empowers the erection of Courts-martial.

**Courts-martial.**<sup>1</sup>—The Courts-martial that exist by virtue of the Mutiny Act are:—1, General; 2, Detachment General; 3, District or Garrison; 4, Regimental or Detachment. Of these, the two first only can try a commissioned officer, or pass sentence of death or penal servitude.<sup>2</sup> The only appeal from the decision of a court-martial is to the Sovereign in Council. The ordinary courts of the realm have no title to intervene so long as the court-martial does not exceed its jurisdiction.<sup>3</sup> In the time of war, the power

<sup>1</sup> See Martial Law, *post*, p. 443.

<sup>2</sup> 25 Vic. c. 5, ss. 8—12.

<sup>3</sup> And it seems that even where it has exceeded its jurisdiction, or acted without jurisdiction, these tribunals will not interfere if the court-martial affects by its sentence the military status alone of the accused; but where the civil rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded the jurisdiction, then it has been said they will interfere. See Cockburn, C. J., in *re Mansergh*, 30 L. J. Q. B., p. 296.

of the first two courts is practically unlimited; but by the preamble of the Annual Act, it is declared 'that no man can be prejudged of life or limb, or subjected, in time of peace, to any kind of punishment within this realm, by martial law, or in any other manner than by judgment of his peers, and according to the known and established law of this realm.'

**The Navy.**—The method of ordering seamen in the royal fleet is closely analogous to that established for the government of the army; but there is this difference between them, that the scheme of naval discipline, instead of being provided for by annual Acts, is laid down in a permanent statute, 24 and 25 Vic. c. 115, called The Naval Discipline Act, 1861, which (sec. 49) provides that any offence triable under that Act may be tried and punished by court-martial. Any offence triable under the Act, not committed by an officer, and not thereby made capital, may, under such regulations as the Admiralty may from time to time issue, be summarily tried and punished by the officer in command of the ship to which such offender belongs; subject, however, to certain restrictions thereby laid down. But, at the same time, it provides (sec. 88) that 'nothing in that Act contained shall be deemed or taken to supersede the authority or power of any court of ordinary civil or criminal jurisdiction in Her Majesty's dominions, in respect of any offence mentioned in that Act, which may be punishable or cognizable by the common or statute law.'<sup>1</sup> The cost of the Navy for the year 1871-72 was £9,756,356.

**The Marines.**—The Marines is a military force, drilled as infantry, whose especial province is to serve

<sup>1</sup> Step. Com. vol. ii. p. 617.

on board ships of war when in commission. The force was first established about the middle of the last century. When serving on board ship, their discipline is regulated by "The Naval Discipline Act," 24 and 25 Vic. c. 115; when on shore, by an act annually passed, called, "The Marine Mutiny Act."<sup>1</sup>

**Yeomanry.**—The Yeomanry Cavalry originated in the menace of French invasion, in the reign of George III. This volunteer force, which still exists, and which is now regulated in the same manner as the Volunteers, must not be confounded with the Yeomen of the Guard, established by Henry VII. in 1485, solely for the defence of his person, and who were indeed regarded by the King rather as domestic servants than as soldiers. Their number was at first fifty; they seem never to have exceeded two hundred.<sup>2</sup>

**Volunteers.**—On the 12th May, 1859, notice was issued from the War Office, that the Government, having had under consideration the propriety of permitting the formation of Volunteer Rifle Corps, under the provisions of the Act, 44 Geo. III. c. 54, as well as of Artillery Corps, and companies in maritime towns in which there may be forts and batteries, were prepared to receive, through the lords lieutenant of counties, any proposals with that object. The result, as it appears from a Royal Commission issued in 1862, was that, on the 1st April, 1862, England had an unpaid army of 162,681 men, composed of the following:—24,363 artillery, 2,904 engineers, 662 light horse, 650 mounted rifles, and 134,096 rifles. The laws relating to the Volunteer force in Great Britain have been consolidated and amended by the Volunteer Act, 1863—

<sup>1</sup> Wharton's Law Lexicon—Marines.

<sup>2</sup> Hallam, vol. ii. p. 131.

26 and 27 Vic. c. 65, by which the previous statutes upon the subject are repealed.

The principal features in the organization of the military resources of the country, as settled by the 35 and 36 Vic. c. 68, are as follows:<sup>2</sup>—

All the land forces of the country, are placed under one control. The whole United Kingdom is parcelled out into military districts or centres, sixty-six in number, each centre being the head-quarters of the brigade attached to that district. Each brigade is to consist of two battalions of the line, two of militia, and the volunteers who belong to the district. All recruiting is to be carried on in the district for the regiments of which the brigade is the centre; that is to say, recruits for the brigade of A district are to be obtained exclusively from A district. All instruction in drill and tactics of the regular force, as well as the militia and volunteers, is to take place at the centre station, under the command of the brigadier. The camp equipage, arms and stores for the brigade, are to be kept at the centre in suitable buildings; so that, upon receipt of orders to that effect from the central authority, all the officers commanding the sixty-six military centres, or depôt-centres as they are called, can at once, without reference to the War Office, or any other authority, equip all the regular troops under their immediate command, call together the reserve forces and volunteers, put them under arms, and take the field in a condition prepared for immediate action; and the

<sup>1</sup> As to the Royal Naval Volunteers, sec. 22 and 23 Vic. c. 40; also 24 and 25 Vic. c. 129. As to the Royal Naval Coast Volunteers, see 16 and 17 Vic. c. 73, also 26 and 27 Vic. c. 5.

<sup>2</sup> *Vide* speech of the Right Hon. E. Cardwell, Secretary of State, Home Department, in the House of Commons, July 15, 1872.

general officers commanding the divisions, in each of which there are a certain number of military districts or centres, can thus at any time have under their command, in a condition ready for active service, all the regular and reserve forces composing the sixty-six brigades. Of the two battalions of the line quartered in each district, one will generally be abroad, its *depôt* remaining at the centre ; and when its term of service abroad is over, it returns to its *depôt*, its place abroad being taken by the other battalion. Every battalion on foreign service leaves its *depôt* at its own centre. A soldier, after a certain number of years' service, can, if he chooses, pass from the line into the reserve force, being however always attached to that portion of the reserve force which belongs to the centre in which his own regiment is located. The system of purchase of commissions by officers is abolished. First, commissions are given away by competitive examination, and a successful competitor undergoes for a certain time military training at a military college before joining the army. Subsequent promotions are made by the commander-in-chief by selection. In like manner, first commissions in the auxiliary forces are given away by lords lieutenant of counties ; and subsequent promotions are to be made by the commander-in-chief by selection.

The general effect of this measure is to give to the Government of the day the power at any moment to put the whole of the United Kingdom in a defensive attitude. An order issued by telegraph from London to the officers commanding the sixty-six centres, may in one day call out the whole army, regular and auxiliaries equipped and on a war-footing,

ready to take the field; the strength of the army being enormously increased by the fact of its holding all the most commanding military positions in the country, which have, with that view, been carefully selected as military centres.<sup>1</sup>

**Moral Support.**—In order to give a correct notion of what is here intended by the expression "*moral support*," it is necessary to distinguish *morality* from *religion*. *Morality* (*mores*, customs, manners) may be defined to be the rule of life accepted by, or peculiar to, a given community or section of a community at a given time. *Religion* may be defined to be the *belief* or *creed* concerning the Almighty, the way in which He governs mankind, and our duties towards Him and our fellow-creatures as required by Him, entertained by each individual. *Morality* is therefore common to a community; *religion*, especially in those countries where freedom is permitted as to religious profession, is personal to the individual. A given religion may be, but is not necessarily, the morality of a community. A given religion may be consistent with, or antagonistic to, the morality of a community. When a given religion is not antagonistic to the morality of a community, the community cannot in reason be said to have any concern with it; for whereas a community can and ought to enforce obedience to its moral code, it cannot enforce belief, which is the mental acceptance of certain things as facts with which the believer is not personally acquainted, and, as such, must be either *rational*—that is, based upon a proper investigation of evidence—or *irrational*, *i.e.*, the blind acceptance of alleged facts

<sup>1</sup> For this statement of the effect of the Army Localization Act 1872, I am indebted to Iltudus T. Prichard, Esq.

as true. It cannot therefore be said that the State regards the Church—and by the word ‘Church’ must here be understood all religious bodies—as a *religious*, but as a *moral auxiliary*. It is as such that the Church becomes a great political engine for good, by showing to each individual that his duties to the State—industry, economy, truthfulness, honesty, and loyalty—are enjoined upon him by the Almighty. The philosophy of the union of Church and State is thus intelligible even in a country where every man is *legally* entitled to profess the religious belief that he entertains; nor is it inconsistent with this freedom of opinion, that the State should support an institution, and appoint duly qualified officers to superintend the education of persons destined to be distributed throughout the land, to give, by their life and doctrine, to the people, and especially the poor, those rational and enlightened views of their duty to God, to their country, and to themselves, necessary to enable them to discharge their moral obligations with propriety and cheerfulness. It is, then, as a teacher of morality, and of religious tenets consistent with British morality, that the Established Church, as well as every other church and individual, owes moral support as a portion of the duty of allegiance to the Crown. The mere fact of any individual not attending the State Church cannot be a reason why he should not contribute to its support as a State institution; nor would any one dream of using such an argument in the case of the prison or the workhouse. As a State institution, brought into existence and supported for the purpose of advantaging the State, the sole question is—Is the advantage equal to the cost of its maintenance?

**Ecclesiastical Law.**—In our sketch of the development of the British Constitution, we had occasion to refer to and to trace the history of the right of the subject to the unfettered exercise of private judgment in the matter of religious belief and profession. The natural result of the establishment of this right has been the existence of numerous sects, each professing its peculiar creed, the adherents of each being more or less numerous. Ecclesiastical, like Military, Law is an unquestionable branch of the Public Law of England; and, like it, in one sense, is so strictly sectional as to have become of minor interest to the reader who is professedly not a member of the Established Church. In another sense, however, it has lost none of its importance; for, excluding the control over the religious faith and worship of the Nonconformist citizen, the rights and pre-eminence of the Established Church have remained inviolate from the date of its reorganisation as the Reformed Church, nor can the doctrines and practices of the State Church be a matter of indifference to any citizen.

British citizens are divided into two classes, the *clergy* and the *laity*.

England is distributed into 12,000 parishes and 200 extra-parochial places. There are two archbishops and twenty-six bishops. In every parish there is a parish church, presided over by a rector, who holds the living. Whoever is in full possession of the rights of such parish church is called the "parson" (*persona ecclesiæ*). During his life he has the freehold of the parsonage, the glebelands, the tithes, and other dues.

The clergy consist of such as have been admitted into *Holy Orders*. They are either *bishops*, *priests*, or

*deacons*, who may be further classified and ranked in the following order:—1, archbishops and bishops; 2, deans and chapters; 3, archdeacons; 4, rural deans; 5, parsons and vicars; and 6, curates. To these may be added, to complete the list of the officers of the Church—1, churchwardens; 2, parish clerks and sextons.

In order to enable them to attend the more closely to their duties, the clergy have certain privileges; *e. g.*, a clergyman cannot be compelled to serve on a jury; nor can he be chosen to any temporal office, such as bailiff, reeve, constable, or the like. During his attendance on Divine service, *eundo, morando, et redeundo*, he is privileged from arrest in civil suits; the glebe and tithes of his parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property; they are, however, liable to a sequestration.<sup>1</sup> On the other hand, however, the liberty of the clergy is in several respects restrained. By 41 Geo. III. c. 63, the clergy are rendered incapable of being elected Members of the House of Commons; by 5 & 6 Will. IV. c. 76, s. 28, of being councillors or aldermen in boroughs; by 1 & 2 Vic. c. 106, ss. 28—30, of taking to farm lands exceeding eighty acres in the whole, without the permission, in writing, of the bishop of the diocese, or of carrying on any trade, except under certain restrictions therein particularised. Subject to the sovereign,<sup>2</sup> who is the Head of the

<sup>1</sup> The writ of *Sequestrari facias* is a process of execution issued against a beneficed clerk, commanding the bishop to enter into the rectory and parish church, and to take and sequester the same, and hold them until, of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt. (Wharton's Law Lexicon.)

<sup>2</sup> The Queen is by law the supreme governor of the Church, pos-

Church, the entire body of the clergy of England and Wales, together with all church property and matters strictly ecclesiastical, are under the control of two archbishops. The jurisdiction of the Archbishop of Canterbury includes the whole twenty-six bishoprics of England and Wales, the following excepted, viz., Chester, Durham, Carlisle, Ripon, Manchester, and that of Sodor and Man, which are subject to the Archbishop of York. The archbishops, and, with one or two exceptions,<sup>1</sup> the bishops, have seats in the House of Lords, and therefore exercise a certain influence over general legislation. Each archbishop has the inspection of the bishops, as well as of the inferior clergy of his province, or, as the law expresses it, the power to *visit* them. He confirms the election of the bishops, and afterwards consecrates them. As archbishop, he, upon receipt of the Sovereign's writ, calls the bishops and clergy of his province to meet him in Convocation; but without the Sovereign's writ he cannot assemble them. To him, as a superior Ecclesiastical Judge, or to his Archiepiscopal Court, all appeals are made from inferior Ecclesiastical tribunals within his province; in addition to which, the Archbishop of Canterbury has also a Court of original jurisdiction over thirteen parishes in London; which

possessing the right, regulated by 25 Hen. VIII. c. 20, s. 4, to nominate to the vacant archbishoprics and bishoprics, the form being to send to the Dean and Chapter of the vacant See the royal licence, or *congéd d'élire*, to proceed to the election, accompanied by the Queen's Letter, naming the person to be elected; and afterwards the Royal assent and confirmation of the appointment is signified under the Great Seal. But this form applies only to the Sees of old foundation; the Bishoprics of Gloucester and Bristol, Chester, Peterborough, Oxford, Ripon, and Manchester, are conferred by Letters Patent from the Crown. The Queen, and the First Lord of the Treasury in her name, also appoint to such deaneries, prebendaries, and canonries, as are in the gift of the Crown.—Stateman's Year-Book, 1872, p. 209.

<sup>1</sup> See 10 & 11 Vic. c. 108; and Steph. Blac., vol. iii. p. 11:

Court is held for him by his official principal, called the Dean of the Arches.<sup>1</sup> Jurisdiction in ecclesiastical matters belongs to—1, the Sovereign ; 2, Upper and Lower Houses of Convocation ; 3, the Privy Council ;<sup>2</sup> 4, the Court of Arches ; 5, the Court of Peculiars, a branch of the Court of Arches ; 6, the Consistory Court ; 7, the Archdeacon's Court. In addition to these there are other Courts, that have only what is called a *voluntary*, as distinguished from a *contentious*, jurisdiction.<sup>3</sup>

In order to understand the principles by which proceedings in these Courts are regulated, some mention must be made of *Canon Law*, its origin, the mode of its introduction into English institutions, and the extent of its influence upon them.

**Canon Law.**—‘The situation,’ says Mr. J. G. Phillimore, ‘of the Church in the dark ages, made a peculiar code, perhaps, necessary for its existence, but undoubtedly essential for its supremacy. Until the reign of Charlemagne, the struggle had been incessant between the See of Rome and other Catholic bishops ; nor had the former always been victorious ; but the union of the temporal and spiritual rulers of Christendom, the chief of the German empire, and the head of the Roman Catholic Church, in one cause, terminated that conflict. From this time, A.D. 800, the contest was between the power of the State and the power of the Church, between the sceptre of the Monarch and the crosier of the Vatican. The Church

<sup>1</sup> See Steph. Blac., vol. iii. p. 11.

<sup>2</sup> See 2 & 3 Will. IV. c. 92 ; 3 & 4 Will. IV. c. 41, s. 3 ; 6 & 7 Vic. c. 38 ; 7 & 8 Vic. c. 69, ss. 9, 12. Appeals from the Archbishop's Court in a case where the Crown is concerned, as well as in other cases, is to the Privy Council, and not to the Upper House of Convocation. (*Gorham v. Bishop of Exeter*, 15 Q. B. 52.)

<sup>3</sup> For the jurisdiction and functions of these several Courts, see Steph. Blac., vol. iii. pp. 436—452.

became a separate independent community, obeying a chief of its own, and, as a necessary consequence, governed by laws of its own. These laws, known as the Canon Law, have more or less, for a shorter or longer period, modified the legislatures of the West. In France, the study of the Canon Law led to the study of the Roman Law; and the zeal and success with which the latter was cultivated, enabled it gradually to eclipse the former, and to deprive it of its power in matters purely secular. But in England, where the study of the Roman Law was stifled, the Canon Law exercised a great and lasting influence. It undoubtedly so far prevailed even in the Common Law Courts, as to lay the foundation of the system of Special Pleading which is still (1850)<sup>1</sup> upheld among us.

‘The first judge of the land was for many centuries an ecclesiastic, and at this day (1850) the Ecclesiastical Courts and the Court of Chancery, with its system of examinations, its frightful expense, and interminable litigation, are its genuine and immediate offspring.’<sup>2</sup>

The Canon Law is founded, partly on certain rules derived from the Scriptures; partly on the writings of the ancient fathers of the Church; partly on the ordinances of general and provincial councils; and partly on the decrees of the Popes in former ages. It is contained in two principal divisions—the *Decrees* and the *Decretals*. The Decrees are ecclesiastical constitu-

<sup>1</sup> Great changes have since that date been introduced, by which pleading as a technical science may be said to be almost abolished. See the Common Law Procedure Acts, 15 and 16 Vic. c. 76 (1852); 17 and 18 Vic. c. 125 (1854), the New Practice Rules of Hilary Term, 1853, and the *Regulæ Generales*, Michaelmas Vacation, 1854.

<sup>2</sup> Phillimore, *History and Principles of the Law of Evidence*, p. 56.

tions made by the Pope and Cardinals. The Decretals are canonical epistles written by the Pope, or by the Pope and Cardinals, at the suit of one or more persons, for the ordering and determining some matter in controversy, and have the authority of law.<sup>1</sup>

By the 25 Hen. VIII. c. 10, revived and confirmed by 1 Eliz. c. 1, it is declared that all canons not repugnant to the King's prerogative, nor to the laws, statutes, and customs of the realm, shall be used and executed. Lord Hardwicke<sup>2</sup> cites the opinion of Lord Holt, and declares that it is not denied by any one that it is very plain all the clergy are bound by the canons, confirmed by the King only; but they must be confirmed by the Parliament, to bind the laity.<sup>3</sup> Some authorities add, "or by immemorial usage."

The Canon Law influences two species of courts: 1. The courts of the Archbishop and Bishops, and their derivative officers, usually called Courts Christian, or the Ecclesiastical Courts. 2. The Courts of the Universities of Oxford and Cambridge, which are either governed by Act of Parliament or custom. The Courts of Common Law have, however, the superintending power over these courts, to keep them within their jurisdiction, and to determine wherein they exceed it.

Lord Thurlow says,—“The Canon Law prevails in this country, only so far as it hath been actually received, with such amplifications and limitations as time and occasion have introduced; and subject at all times to the Municipal Law. It is founded on the Civil Law; consequently, the tenets of that law may

<sup>1</sup> Petersdorff's Abr., vol. iii. p. 21.

<sup>2</sup> 2 Atk., p. 665.

<sup>3</sup> 2 Salk., p. 412.

also serve to illustrate the received rules of the Canon Law.<sup>1</sup>

**Pecuniary Support—Taxation.**—All that our limits permit has already been said upon the duty of pecuniary support, and upon the subject of taxation.<sup>2</sup>

**Duties relative to Perpetuation.**—The question of treasure or capital has already been under consideration, nor do our limits permit of further comment upon the point, though there is perhaps no one point upon which erroneous notions are more dangerous to the peace and welfare of a State ; no one point upon which the ignorant are more apt to dilate, no one point upon which the generally well-informed appear to entertain less definite notions, except it be that of education, to which, after a few words upon marriage, our attention must be directed.

**Marriage.**—The formalities of marriage are regulated by the Marriage Acts, which allow marriage to be solemnised either with a religious ceremony or without it.

The 6 and 7 Will. IV. c. 85 (since amended in sundry points of detail) authorises marriages to be celebrated in England, after due notice and certificate issued, either in a registered place of worship, or at the office of the superintendent-registrar. In either case it is required to be in the presence of the registrar of the district, and of two witnesses, and upon making the declaration and using the form of words prescribed.

By these Acts, marriage cannot be contracted, in England, by mere consent alone, however clearly ex-

<sup>1</sup> Scott v. Tyler, 2 Dick, p. 720.

<sup>2</sup> See Development of the British Constitution.

pressed, before witnesses. There must be some previous notice, or proclamation of banns, or licence. Either a clergyman of the Established Church, or the registrar of the district, must be present, with witnesses, at the ceremony or mutual declaration respectively; and the marriage must be in an authorised place, and at authorised hours.

When the marriage takes place in a church or chapel of the Church of England, the service must be performed by the officiating minister, according to the rites of that Church, in presence of two or more witnesses. If the marriage is solemnized in a registered Dissenting Chapel, there may be superadded to the civil contract whatever religious ceremony the parties may think fit to adopt. But if the parties contract marriage in a registrar's office, the mutual declaration and exchange of matrimonial consent completes the civil contract, and no religious ceremony is used at such marriage.

The Archbishop of Canterbury is authorised to grant special licenses to marry at any convenient time or place. In all other cases, marriage in England cannot take place in a private house, and must be celebrated with open doors in canonical hours; that is, between eight and twelve in the forenoon. If the person proposing to marry is a minor, and not a widow or widower, the consent of the father of such person, if living, must be obtained. If the father is dead, the consent of a guardian is required; and if there be no guardian, the consent of the mother, if unmarried; if there be no mother unmarried, then the consent of a guardian appointed by the Court of Chancery; and in some cases of disability, or where consent is unreason-

ably withheld, relief may be obtained by petition to the Lord Chancellor. Formerly a marriage might be declared void by reason of the want of consent by parents or guardians, but this rule was found to be productive of mischief; and, under the existing law, if a minor succeed in getting the marriage ceremony performed, the marriage is not accounted void by reason of the non-consent of parents and guardians. All marriages are required by law to be registered.

It is a general rule, whatever inconveniences may sometimes attend it, that a marriage duly solemnised in any country according to its own law, ought to be recognised as binding in point of form all over the world. But there is a distinction between marriage rites and the legal capacity of marrying; for the form of the ceremony depends on the place where the marriage is solemnised, while the legal capacity of persons to marry is determined by the law of the country of their domicile. This principle was established by the judgment of the House of Lords, in *Brook v. Brook*. The parties were domiciled in England, where marriage with a deceased wife's sister is prohibited, and they were married at the Danish port of Altona, where the law permits such a marriage. This marriage was declared invalid; and the grounds of decision were, that all persons domiciled in England can marry only those whom the law of England allows them to marry; and that, by getting the ceremony performed at Altona, or elsewhere, they might vary the form, but could not enlarge the capacity to marry.<sup>1</sup>

The effect of marriage upon the parties is the subject of Private Municipal Law.

<sup>1</sup> Mackenzie's Roman Law, p. 107 *et seq.*

**Bigamy.**—24 and 25 Vic. c. 100, s. 57.—‘Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony. . . . Provided always that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of her Majesty or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.’

On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. Held that upon this finding the conviction could not be supported.<sup>1</sup>

**Education.—Instruction.**—Before adverting to the law upon this subject, it may not be inexpedient to enquire, What is Education? Are the words “*Education*” and “*Instruction*” synonymous terms? I define education to be—the development or drawing out of the power, or powers, whether physical, mental, or moral,

<sup>1</sup> Reg. v. Briggs, 1 Dears and B. p. 98.

*of a human being.* Instruction may be defined to be—the imparting of information to a human being concerning either moral, secular, or religious subjects. Every human being must, therefore, become educated. Whether by his education physical and mental vigour and moral rectitude are developed, stunted, or destroyed, must depend upon the circumstances of his education. Parents who dwell in filth, inhaling a poisoned atmosphere, mingling their discourse with foul and blasphemous utterances, who drive their children into the streets to beg or to steal, educate their children as perfectly as do those parents whose habitation is remarkable for its spotless cleanliness, who inhale the purest atmosphere, whose discourse is the most chaste and enlightened, who watch over their children with the most parental tenderness and care, and who from earliest infancy instil virtue with kindness. But how different the education; how different the physical and mental condition of the children; with what strangely different sentiments must they regard the world and man. Is it surprising that the children of the former violate the laws of the land; that they go from bad to worse; that they ultimately die in the workhouse or the gaol? The wonder is that any escape the doom threatened at their birth. Is it not strange that an enlightened nation—a nation that has waged war against almost every species of tyranny—a nation that makes a boast of its Christianity—that has gone so far in humanity as to possess regular organisations for the suppression of cruelty to animals, should suffer thousands of children to be annually and systematically educated in this manner? And is it not more strange that these little martyrs should be thus sacrificed upon the double plea

of the liberty of the subject and the danger of educating the poor? As to the liberty of the subject, that is violated by compelling parents either to educate their children *properly* or to let the State do it for them, no comment need be made. As to the danger of educating the poor, I have endeavoured to show that the danger lies in permitting certain parents to educate their own children. There is, however, another, and, though not so great, yet a most formidable danger attending the education of the poor by others than their parents. This danger is in confounding education with instruction; the danger of putting sharp weapons into inexperienced hands; the danger of supposing that by teaching a child reading, writing, arithmetic, or the catechism, the State is performing the duty neglected by the parent, which duty, when performed, will make the child in after-life a self-supporting, upright, and loyal citizen; the danger of supposing that any person who can himself read, write, or cipher, even well, is qualified to instil into the hearts of those little ones that appreciation and love of the beautiful and the good, that will enable them to counteract and survive the influence of their wretched homes. Good playgrounds, gymnasiums, swimming baths, maps, models, and pictures, open by day and gas-light, with tales well told of the good men, women, and children that have lived and died before them, are attractions that no child can withstand, influences that no home can entirely destroy, incentives to learning and a thirst for useful information that no corrupt press can satisfy. They are blessings that can be supplied at a cost utterly insignificant when measured by the good that must result in empty gaols and workhouses.

On the 30th June, 1858, a Royal Commission issued, on the Address of the House of Commons, 'to enquire into the present state of Popular Education in England, and to consider and report what measures, if any, are required for the extension of sound and cheap Elementary Instruction to all classes of the people.' This Commission made, on the 18th March, 1861, a voluminous Report, which contains much valuable information, and submits a variety of recommendations; but, strange to say, *none* of which are in favour of any compulsory system of education, except in the case of vagrants and criminals.<sup>1</sup>

By the 19 and 20 Vic. c. 116, her Majesty is empowered from time to time, by warrant under her royal sign manual, to appoint any member of the Privy Council to be, during her pleasure, Vice-President of the Committee of the Privy Council on Education, and to direct that a salary, not exceeding £2000 per annum, be paid to him out of any monies provided for that purpose by Parliament; and such Vice-President is made capable of being elected, sitting and voting as a member of the House of Commons.

By 7 and 8 Vic. c. 101, s. 40 (amended by 11 and 12 Vic. c. 82, and 13 and 14 Vic. cc. 11, 101), the Poor Law Board has power to combine unions, or parishes not in union, into *school districts*, for the management of any class or classes of infant poor not above the age of sixteen (being chargeable to such parish or union), who are orphans, or are deserted by their parents, or *whose parents or guardians consent* to their being placed in the school of such district.

By 17 and 18 Vic. c. 86; 18 and 19 Vic. c. 87;

<sup>1</sup> See 3 Steph. Com., p. 214, note.

19 and 20 Vic. c. 109 ; and 20 and 21 Vic. c. 55, it is made lawful for any court, magistrate, or justice before whom any person under the age of sixteen shall be convicted and sentenced to receive any punishment to the extent of fourteen days' imprisonment, to direct that, in addition to such punishment, such person shall be sent to a Reformatory School for a period of not less than two or more than five years. There is also power to compel the parent or step-parent to contribute, if able, to the extent of five shillings a week.

By 18 Vic. c. 34, it is provided that the guardians of the poor may (subject to the superintendence of the Poor Law Board) grant relief for the purpose of enabling any poor person, lawfully relieved out of the workhouse, to provide education for any child of such person (between the ages of four and sixteen) in any school to be approved of by the guardians, for such time and under such conditions as they shall see fit ; *provided however that it shall not be lawful for the guardians to impose such education as a condition of relief.*

The Industrial Schools Act, 24 and 25 Vic. c. 113, empowers any two Justices at Petty Sessions to send to one of these certified schools any child (not previously convicted of felony) who, being apparently under the age of twelve, has committed an offence punishable by imprisonment, or some less punishment ; or who, being apparently under the age of fourteen, is found begging or receiving alms, or in any street or public place for that purpose, or found wandering without any home or settled place of abode or visible means of subsistence, or frequenting the company of reputed thieves, or who is represented by his parent not to be amen-

able to his control, and that he *desires him to be sent to such school, and undertakes to pay for his maintenance there.*

By 25 and 26 Vic. c. 43, the guardians of any parish are enabled to send any poor child (being an orphan or deserted, *or else with the consent of his parents*) to any school certified by the Poor Law Board as fit for the purpose, and may pay the expenses incurred thereby, and for the *maintenance, clothing, and education* of such child within certain limits specified.

It is, however, to Mr. Forster that the honour is due of having carried through Parliament, and placed on our Statute Book, the first English Act of Parliament which, though possibly far from perfect, nevertheless professedly aims at meeting the evil that has been suffered to grow in this country to a most frightful extent. Parliament appears at last to have recognised the fact, that it is the duty of the sovereignty to see that no parent is suffered to train up his child in such a way as to render him a certain curse to the community, and to have accepted the policy of prevention in lieu of that of cure. It has distinguished that education and instruction which ought to be compulsory from that which should always be voluntary. If, then, the School Boards exercise the sacred trust now placed in their hands by the Legislature with wisdom, it will no longer be able to be said with truth that 'the young children ask bread, and no man breaketh it unto them.'

The 33 and 34 Vic. c. 75, entitled 'An Act to provide for Public Elementary Education in England and Wales,' enacts, sec. 5, 'There shall be provided for every school district a sufficient amount of accommoda-

tion in Public Elementary Schools available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made, and where there is an insufficient amount of such accommodation, in this Act referred to as 'public school accommodation,' the deficiency shall be supplied in manner provided by this Act.'

Sec. 7. 'Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act; and every public elementary school shall be conducted in accordance with the following regulations (a copy of which regulations shall be conspicuously put up in every such school; namely,

'1. It shall not be required, as a condition of any child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday school, or any place of religious worship, or that he shall attend any religious observance or any instruction in religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent, or that he shall, if withdrawn by his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs.

'2. The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting, and shall be inserted in a time table to be approved by the Education Department, and to be kept permanently and conspicuously affixed in every schoolroom; and any

scholar may be withdrawn by his parent from such observance or instruction without forfeiting any of the other benefits of the school.

‘3. The school shall be open at all times to the inspection of any of Her Majesty’s Inspectors, so, however, that it shall be no part of the duties of such Inspector to inquire into any instruction in religious subjects given at such school, or to examine any scholar therein in religious knowledge or in any religious subject or book.

‘4. The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school, in order to obtain an annual Parliamentary grant.’

Sec. 14. ‘Every school provided by a school board shall be conducted under the control and management of such board in accordance with the following regulations :—

‘1. The school shall be a public elementary school within the meaning of this Act :

‘2. No religious catechism or religious formulary which ‘is distinctive of any particular denomination shall be taught in the school.’

Sec. 17. ‘Every child attending a school provided by any school board, shall pay such weekly fee as may be prescribed by the school board, with the consent of the Education Department, but the school board may from time to time, for a renewable period not exceeding six months, remit the whole or any part of such fee in the case of any child when they are of opinion that the parent of such child is unable from poverty to pay the same, but such remission shall not be deemed to be parochial relief given to such parent.’

Sec. 26. 'If a school board satisfy the Education Department that, on the ground of the poverty of the inhabitants of any place in their district, it is expedient for the interests of education to provide a school at which no fees shall be required from the scholars, the board may, subject to such rules and conditions as the Education Department may prescribe, provide such school, and may admit scholars to such school without requiring any fee.'

Sec. 53. 'The expenses of the school board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars, or out of moneys provided by Parliament, or raised by way of loan, or in any manner whatever received by the school board, and any deficiency shall be raised by the school board as provided by this Act.

Sec. 54. 'Any sum required to meet any deficiency in the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate.

'The school board may serve their precept on the rating authority, requiring such authority to pay the amount specified therein to the treasurer of the school board out of the local rate, and such rating authority shall pay the same accordingly, and the receipt of such treasurer shall be a good discharge for the amount so paid, and the same shall be carried to the school fund.

'If the rating authority have no moneys in their hands in respect of the local rate, they shall, or if they have paid the amount then for the purpose of reimbursing themselves, they may, notwithstanding any limit under any Act of Parliament or otherwise, levy

the said rate, or any contributions thereto, or any increase of the said rate or contributions, and for that purpose shall have the same powers of levying a rate and requiring contributions as they have for the purpose of defraying expenses to which the local rate is ordinarily applicable.'

Sec. 74. 'Every school board may from time to time, with the approval of the Education Department, make byelaws for all or any of the following purposes :

'1. Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the byelaws, to cause such children (unless there is some reasonable excuse) to attend school :

'2. Determining the time during which children are so to attend school ; provided that no such byelaw shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour :

'3. Providing for the remission or payment of the whole or any part of the fees of any child where the parent satisfies the school board that he is unable from poverty to pay the same :

'4. Imposing penalties for the breach of any byelaws :

'5. Revoking or altering any byelaw previously made.

'Provided that any byelaw under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial ex-

emption of such child from the obligation to attend school if one of Her Majesty's Inspectors certifies that such child has reached a standard of education specified in such byelaw. Any of the following reasons shall be a reasonable excuse ; namely,

‘ 1. That the child is under efficient instruction in some other manner :

‘ 2. That the child has been prevented from attending school by sickness or any unavoidable cause :

‘ 3. That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the byelaws may prescribe.

‘ The school board, not less than one month before submitting any byelaw under this section for the approval of the Education Department, shall deposit a printed copy of the proposed byelaws at their office for inspection by any ratepayer, and supply a printed copy thereof gratis to any ratepayer, and shall publish a notice of such deposit.

‘ The Education Department before approving of any byelaws shall be satisfied that such deposit has been made and notice published, and shall cause such inquiry to be made in the school district as they think requisite.

‘ Any proceeding to enforce any byelaw may be taken, and any penalty for the breach of any byelaw may be recovered, in a summary manner; but no penalty imposed for the breach of any byelaw shall exceed such amount as with the costs will amount to five shillings for each offence, and such byelaws shall not come into operation until they have been sanctioned by Her Majesty in Council.

‘It shall be lawful for Her Majesty, by Order in Council, to sanction the said byelaws, and thereupon the same shall have effect as if they were enacted in this Act.

‘All byelaws sanctioned by Her Majesty in Council under this section shall be set out in an appendix to the annual report of the Education Department.’

**Martial Law.**—Martial Law, or that which might with much greater propriety be termed ‘*Martial Rule*,’ may be defined to be that independent exercise of discretion, uncontrolled by the ordinary rules of the Civil Laws relating to life and property, which the Sovereign, when in extremity, is justified in using. It corresponds with the natural right of self-preservation, which is recognised and conceded by every civilized nation to each individual—*quod necessitas cogit defendit*. Whether the Sovereign, or the persons to whom sovereign power is delegated, are or are not justified by the circumstances of the particular case, in resorting to this extreme measure, must, it would appear, be a mere matter of opinion, the opinion of the sovereign person so acting being *prima facie* entitled to the chief consideration; or, in other words, clear proof of *mala fides* would appear to be required in order to justify his being held guilty or punishable for so acting. An obvious want of ordinary discretion would, however, indicate the necessity of the immediate removal of any person so defective from a trust of such magnitude. The Duke of Wellington said, ‘Martial Law’ is neither more nor less than the will of the general who commands the army. In fact, Martial Law means no law at all. There-

<sup>1</sup> The reader is referred to M’Arthur on Courts-Martial, and Simmons on Courts-Martial.

fore the general who declared Martial Law, and commanded that it should be carried into execution, was bound to lay down distinctly the rules, regulations, and limits according to which his will was to be carried out.<sup>1</sup> The effect of a proclamation of Martial Law is notice to the inhabitants that the executive Government has taken upon itself the responsibility of suspending the jurisdiction of all ordinary tribunals for the protection of all life, person, and property, and has authorized the military authorities to do whatever they may think expedient for the public safety.

Proceedings by Courts Martial must not be confounded with Martial Law. 'Martial Law is quite a different thing from ordinary military law, and is founded on paramount necessity, and proclaimed by a military chief.'<sup>2</sup> Courts martial are parts of the recognized judicatures of the realm, whose jurisdiction is confined to the military and naval forces of the Crown. In *Walton v. Gavin*, 16 Q. B. 61, Lord Campbell, C. J., said,—'None are bound by the Mutiny Acts or the Articles of War, except Her Majesty's forces; and I am most anxious, as a constitutional Judge, that this should be fully understood to be my opinion.'<sup>3</sup> Under Martial Law the trial may be by court-martial, but it is not necessarily so.<sup>4</sup>

<sup>1</sup> Hansard's Parliamentary Debates, vol. cxv. p. 880.

<sup>2</sup> Kent's Com. i. p. \*341, note (a).

<sup>3</sup> See *Wolfe Tone's Case*, 27 State Tr., p. 615.

<sup>4</sup> Forsyth's Cases and Opinions on Constitutional Law, p. 208.

## APPENDIX.

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### INDICTABLE OFFENCES CLASSIFIED WITH THE VARIOUS ACTS RESPECTING THEM.

#### I. OFFENCES AGAINST THE STATE.

Treasons: 25 Edw. III. st. 5, c. 2; 7 & 8 Will. III. c. 3; 7 Anne, c. 21, ss. 10, 11; 20 Geo. II. c. 30; 36 Geo. III. c. 7, ss. 1, 5, 6; 39 & 40 Geo. III. c. 93; 54 Geo. III. c. 146; 57 Geo. III. c. 6; 5 & 6 Vic. c. 51; 11 & 12 Vic. c. 12.—Felonious Compassing to Levy War, &c.: 11 & 12 Vic. c. 12, s. 3.—Inciting to Mutiny: 37 Geo. III. c. 70.—Unlawful Oaths: 37 Geo. III. c. 123; 52 Geo. III. c. 104.—Illegal Training and Drilling: 60 Geo. III. & 1 Geo. IV. c. 1.—Serving Foreign States: 59 Geo. III. c. 69; 33 & 34 Vic. c. 90.—Coinage Offences: 24 & 25 Vic. c. 99.—Embezzling Queen's Stores: 27 & 28 Vic. c. 91—recites the other Acts or parts of Acts not repealed.—Attempts to Injure or Alarm the Queen: 5 & 6 Vic. c. 51, s. 2.—Seditious Libels: 60 Geo. III., & 1 Geo. IV. c. 9; 11 Geo. IV., & 1 Will. IV. c. 73.—Smuggling: 16 & 17 Vic. c. 107, ss. 244—250, 268, 269, 275—277, 301—308.—Refusing to execute a Public Office: see Archbold's Pleading and Evidence in Criminal Cases, p. 392.—Nuisances—To Highways: 5 & 6 Will. IV., c. 50, s. 95; 4 & 5 Vic. cc. 51, 59; 8 & 9 Vic. c. 71; 11 & 12 Vic. c. 123; 25 & 26 Vic. c. 61;—To Turnpike Roads: 3 Geo. IV. c. 126; 4 Geo. IV. c. 95; 4 & 5 Vic. cc. 33, 51;—To Bridges: 55 Geo. III. c. 143.

## II. OFFENCES AGAINST PUBLIC JUSTICE.

Escape, Prison Breach, and Rescue: 1 Edw. II. st. 2; 16 Geo. II. c. 31; 1 & 2 Geo. IV. c. 88; 4 Geo. IV. c. 64, ss. 43, 44.—Returning from Transportation: 5 Geo. IV. c. 84, ss. 22—24; 4 & 5 Will. IV. c. 67.—Perjury and Voluntary Oaths: 5 Eliz. c. 9; 2 Geo. II. c. 25, s. 2; 23 Geo. II. c. 11; 5 & 6 Will. IV. c. 62, s. 13; 14 & 15 Vic. c. 100, ss. 19—22.—Assaulting, &c. Officers of Justice: 24 & 25 Vic. c. 100, ss. 37, 38.—Shooting at and Assaulting Officers of the Customs: 16 & 17 Vic. c. 107, ss. 249, 251.—Riot: 1 Geo. IV. st. 2, c. 5; 24 & 25 Vic. c. 97, ss. 11, 12.—Perjury and Voluntary Oaths: 5 Eliz. c. 9; 2 Geo. II. c. 25, s. 2; 23 Geo. II. c. 11; 5 & 6 Will. IV. c. 62, s. 13; 14 & 15 Vic. c. 100, ss. 19—22.

## III. OFFENCES AGAINST THE LAW OF NATIONS.

Piracy: 11 Will. III. c. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24; 12 Geo. III. c. 20; 18 Geo. II. c. 30; 7 Will. IV. & 1 Vic. c. 88; 13 & 14 Vic. c. 26.—Slave Trading: 5 Geo. IV. c. 113; 6 & 7 Vic. c. 98.—Violation of Safe-conduct or Passports: Magna Carta, s. 41 *et seq.*; see Steph. Com., vol. iv. p. 297 *et seq.*

## IV. OFFENCES AGAINST PUBLIC MORALITY.

1. *In the matter of Religion.*

Blasphemy: 1 Edw. VI. c. 1; 1 Eliz. c. 2; but these do not alter the Common Law.—Blasphemous Libels: 60 Geo. III. & 1 Geo. IV. c. 8; 11 Geo. IV. & 1 Will. IV. c. 73.—Obstructing Clergymen in the Discharge of their Duty: 24 & 25 Vic. c. 100, s. 36.—Disturbing Public Worship: 52 Geo. III. c. 155, ss. 2, 12; 23 & 24 Vic. c. 32.

2. *The Relation of the Sexes.*

24 & 25 Vic. c. 100:—Bigamy: s. 57. Abduction of a Woman on account of her Fortune: s. 53. Abduction of a Girl under Sixteen Years of Age: s. 55. Rape: s. 48—52. Carnal Knowledge defined: s. 53. Procuring the Defilement of a Female: s. 49. Carnally Abusing Children: ss. 50, 51. Attempting to procure Abortion: ss. 58, 59. Indecent Assault: s. 52.

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CHRONOMETRICAL CHART OF ROMAN HISTORY.

BY

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"The History itself treats the Roman Law by epochs—the first being that of 'the Kings,' the second that of 'the Republic,' and the third that of 'the Emperors.' This history is followed by an extremely well digested and carefully composed sketch of the Roman Law as it now remains to us. With a few errors in the translations of technical terms, and some, but rare, inelegancies in the rendering of the French into English, faults from which few of those who translate French into English are free, we can truly say that this work is highly creditable to its translators and editors, and we can recommend it to all of our readers who desire to learn, with as little labour as possible, something of the history and construction of that famous code which has been the foundation of almost every code of law in Europe."—*Law Times*.

"This translation, from its great merit, deserves a warm reception from all who desire to become acquainted with the history and elements of Roman Law, or have its interests as a necessary part of a sound legal education at heart. . . . With regard to Ortolan's great work, it is enough to say that English writers have been in the habit of doing piecemeal what Messrs. Prichard and Nasmith have done wholesale. Hitherto we have had but gold-dust from the mine; now we are fortunate in obtaining a large nugget. Much of the author's spirit is taken up in the translators' introduction, and extends, perhaps, even to the Chronometrical Chart, which is a peculiar feature of the work."—*Law Journal*.

"That so great and valuable a work as M. Ortolan's 'History of Roman Law' should have passed through eight editions in his own country without any attempt being made to produce an English version of it, is, to say the least, somewhat remarkable. . . . The translators seem to us to have performed their work most carefully and conscientiously. The result of their labours will place in the hands of very many Englishmen a most valuable aid not only to those who wish to study and understand the law as law, but also the historical events with which it is inseparably connected."—*Standard*.

"The learned Frenchman's history leaves nothing to be desired as an introductory text-book of Roman Law. The translation is well executed; it must have been a task of no ordinary difficulty, as it should be remembered that not only is the Roman a system of law having terms different from our law terms, but also that the French have adopted very many of these Roman terms into their own law."—*School Board Chronicle*.

EDUCATIONAL WORKS BY THE SAME AUTHOR.

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THE  
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OF THE  
HISTORY OF ENGLAND.

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This Chart embraces the History of England, from the invasion of Julius Cæsar, 55 B.C., till the year 1860 A.D., and is so arranged that the position of each event determines its date, renders its relationship to other events apparent, and enables the student to explain actions by circumstances, and to associate men with their times. It also gives what mere figures (dates) fail to impart, viz., a well-defined map of the period.

Each dynasty is rendered distinct by being represented upon a different coloured ground. The narrative is printed in ordinary type; legal matters in Old English; revenues, populations, &c., in Egyptian; literature, the arts, inventions, acquisition of territory, social improvements, &c., in Italic; with suitable and distinct signs. By this combination of local arrangement, colour, symbols, and types, an entire picture of the History of England, civil, military, religious, and social, is placed before the eye in a manner never before attempted, and by which the characteristic features of each period are rendered conspicuous.

This Chart further differs from the generality of works bearing that title, inasmuch as it is not a mere table of a few of the most prominent events in English History, but an arrangement of 3,210 facts, selected from every class of information connected with the subject. Though simple in form, it is most comprehensive in matter; and though better adapted than any existing chart to aid the young, it is equally valuable to the accomplished scholar, who will be the best able to discover its utility and merits.

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EXTRACT FROM "THE TIMES,"

February 10th.

An attempt to teach history by what geographers call "projection" is certainly a novelty even among the phenomena of modern education. This, however, is the object of the "Chart" above mentioned. It is a map, not of a country, but of a period. Mr. Nasmith's fundamental idea is that the abstract symbolism of

numerals by which we express what we call "dates" fails to yield any sufficient notion of chronology to the minds of the young or uninstructed. A child may be taught to repeat that Richard III. was killed in 1485, and Charles II. restored in 1660, without acquiring any accurate impression of the chronological relation of the two facts. This is not the way in which we learn that Durham is in the north of England and Hampshire in the south. We get that knowledge from a map by the aid of locality, and Mr. Nasmith conceives that chronological knowledge may be imparted in like manner. With this purpose in view he takes a certain period of time, being that which coincides with the ascertainable history of this country, and frames it, as it were, in a plane five feet square. This quadrangular surface is to represent 1,860 years, or the interval between the beginning of the Christian era and the time up to which the chart is brought. That is the postulate. It remains only to treat this space as any representation of territory would be treated in an ordinary map, and to divide it into shires or shares. For symmetry's sake the chart is supposed to contain a round 2,000 years, the odd 140 years required to complete the twenty centuries being left, as we may say, unsurveyed. There is no difficulty now in dividing the surface of the chart into parts or squares, nor in subdividing these again, until we get certain measured spaces representing centuries, and certain smaller ones representing years. Time thus becomes expressed by locality. Early times are in the north of the map, late times in the south, and a square of time to the west is earlier than a square on the same line to the east. We read the chart, in short, as we should read any other page, beginning at the top and going from left to right.

The next aid, and a very important one, is that of colour. We have all been taught that the first inhabitants of England were independent Britons. Then came the Romans, then the Saxons, then the Danes, then the Normans, and with these and after these a succession of dynasties enduring to the present day. Let the times of the Britons, then, be coloured green, those of the Romans brown, those of the Saxons blue, those of the Danes orange, those of the Normans drab, those of the Plantagenets yellow, those of the Lancastrians and Yorkists shaded pink, those of the Tudors green, those of the Stuarts pink, and those of the House of Hanover red. Here are very plain distinctions, and we can tell one division of history from another by the colour, as easily as we can distinguish a pink Kentucky from a blue Tennessee on a map of the old United States. Now, let us suppose this chart hung up against a wall, and showing clearly and visibly certain great divisions representing centuries, certain smaller divisions representing decades, and certain still smaller divisions representing years. First there will be the teaching of the colours. We observe, for instance, that the great square which by its place in the map must represent the twelfth century, is coloured irregularly, half drab and half yellow, and that the yellow colour is then continued over the next two great squares, representing the thirteenth and fourteenth centuries. This tells us plainly enough that the Normans began the twelfth century for us, that they were succeeded in about the middle of it by the Plantagenets, and that the Plantagenets reigned all through the thirteenth and fourteenth centuries. Similarly the green colour, covering the whole of the great square or century shown by its position to be the sixteenth, identifies that shire of time with the Tudors, while a certain white *enclave*, or district, in the very middle of the Stuarts' pink division, gives us an unmistakable notion of the Commonwealth. By going nearer to the map we shall discover specifications corresponding to those villages, hamlets, or *tumuli* on the map of a country; viz., the principal events of successive years, laid down duly in their successive small shires; and so, in short, we have our "Chronometrical Chart of the History of England."

To the question, How will this teaching answer? experience must furnish the reply; but we think the more the eye is thus used the better. A pupil or student,

however careless or however dull, could never fail to carry away with him the general appearance of a large coloured surface always before him. He would recollect it as he would recollect the pattern of the paper-hangings or the position of the clock in the school-room. He would remember that in the chart of history yellow came before green, green before pink, and pink before red. He would probably be able to say that blue was at the top and red at the bottom, with the other principal colours between them. Yet, if he do all this, and simply connect these half-a-dozen colours with half-a-dozen names, he would have got an elementary notion of English chronology. If he could go further, and recollect in which small subdivision of each great square he used to find a certain event characteristically denoted, he would know all the dates of importance in the history of England, and be able to take a survey of the whole period besides. How much of this can really be done teachers would soon discover, and, as the chart is published in the form of an atlas as well as in the form of a map, ordinary readers can make the discovery also.

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## OPINIONS.

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*From the* LORD CHANCELLOR.

5, CROMWELL HOUSES, W., May 20, 1868.

SIR,—I have to thank you very much for the Chronometrical Chart of English History, which you have been so good as to send me. I am satisfied there is no way by which History can be taught, and no way by which a reference to the prominent facts of History can be made so easily, as by means of a Synoptical Chart of this description.

But the very original and striking arrangements as to colour, type, order, and superficial division, which you have adopted, appear to make your Chart very superior to anything of the kind I have seen, and to make it a great acquisition to the teacher and the student, and indeed to every library.

I should think that a Law student, in particular, would find it pre-eminently useful, from the manner in which it interweaves the history of the Law with the history of the Country, at the same time that the threads of each can be distinctly traced.—I am, Sir, your obedient servant,

CAIRNS.

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THE EARL OF SHAFTESBURY, K.G.

24, GROSVENOR SQUARE, May 20th, 1868.

SIR,—I must again thank you by letter for the very valuable and interesting Historical Chart. The labour that you have expended on a work of so much arrangement and research, will be the means of sparing all who study it a great deal of persevering and perhaps fruitless toil.

Your obedient servant,

SHAFTESBURY.

## VISCOUNT PALMERSTON, M.P., K.G., G.C.B.

94, PICCADILLY, *May 16th, 1863.*

Lord Palmerston presents his compliments to Mr. Nasmith, and begs to return his best thanks for the highly interesting and instructive volume which Mr. Nasmith has been so good as to send him.

## LORD BROUGHAM AND VAUX, F.R.S.

4, GRAFTON STREET, *May 20th, 1863.*

Lord Brougham presents his compliments to Mr. Nasmith, and returns his best thanks for the valuable present of his Chronometrical Chart, which he believes will prove most useful: it is a work of great labour.

## THOMAS CARLYLE, ESQ.

(Rector of the University of Edinburgh.)

5, GREAT CHEYNE ROAD, CHELSEA, *Oct. 22, 1867.*

DEAR SIR,—I have more than once looked into your Map of the History of England, and can now, since you request it, have no hesitation in saying, what is strictly the truth, that, were I a schoolmaster, teaching young people English History, I would decidedly procure myself a copy of that map, and hang it up, where it should be continually conspicuous and legible to all my pupils.

Yours sincerely,  
T. CARLYLE.

## THE DEAN OF CHICHESTER.

THE DEANERY, CHICHESTER, *Oct. 22, 1866.*

MY DEAR SIR,—Illness has alone prevented me from thanking you sooner for your great kindness in sending to me your Chronometrical Chart. It is a most important work, valuable to the general reader as well as to the student.

I am, dear Sir, your obliged and faithful servant,  
W. F. HOOK.

## JAMES ANTHONY FROUDE, ESQ., M.A.

(Late Fellow of Exeter College, Oxford, and Author of "The History of England," etc., etc.)

5, ONSLOW GARDENS, S.W., *June 6, 1868.*

MY DEAR SIR,—I have to thank you heartily for your excellent Chart of English History. The plan of it is easily comprehended, and I cannot doubt but that it will be of much service in helping schoolboys to apprehend and recollect the framework of our national annals. I say schoolboys, but it will be handy and convenient for all of us.

Faithfully yours,  
J. A. FROUDE.

J. G. PHILLIMORE, ESQ., Q.C.

(Reader on Constitutional Law to the Inns of Court.)

LINCOLN'S INN, *May 19th, 1863.*

DEAR SIR,—You are good enough to ask for my opinion of your Chronometrical Chart. I have examined it attentively, and have much pleasure in assuring you that I think the work reflects great credit on the attainments and industry of its author, and that when the principle on which it has been drawn up has been mastered, it will render most valuable aid to the historical student, by abridging his labour and fixing the events of the particular period which he is considering in his recollection. Wishing it all success,

I remain, your faithful servant,

J. G. PHILLIMORE.

J. STUART LAURIE, ESQ.

(H.M. Inspector of Schools, Assistant Commissioner on Education, Director of Public Instruction, Ceylon, and Editor of various Educational Works.)

I have minutely examined Mr. Nasmith's Chronometrical Chart of English History, and I am convinced that it is the most wonderful educational discovery of the age. The scheme is entirely unique, practical, and complete; and I believe it would be impossible to devise a more effectual implement for teaching the cardinal facts of history.

The groundwork of the idea is the application of the plan of a topographical map to the portrayal of the past; accordingly, facts are localised, and of course chronologically arranged. The events, in their various leading divisions, have been selected with marvellous industry and discrimination, and I need scarcely add, with a thorough knowledge of the subject and of the positive requirements of the student of History.

As a discovery, the gist of its importance lies in its so-styled "Chronometrical" arrangement; and this is exhibited in the ingenious mode of grouping the facts, and of colouring the epochs. For example, the centuries are arranged in successive squares; these are divided into small spaces, each space representing a decade, and each decade is subdivided into tenths, to represent the years. In these smaller squares there are delineated, in bold and appropriately varied typography, the grand events, or assemblage of events, of the year. The result is, that when looked at as a whole, the date and the event blended with it are found to occupy a fixed spot on the map, and the mind not only becomes unconsciously associated with the information given in that spot, but also, what is better, the mind's eye retains the impression not less faithfully than it can recall the position of a country on a map. An instructive lesson is thus conveyed even by the blank spaces, as these represent either national peace, or pauses in the progress of social, constitutional, legal, or scientific affairs, while they are viewed in juxtaposition with more pregnant years. The colouring of the epoch is an important auxiliary to this technical device; but this and the manifold merits of Mr. Nasmith's discovery, can only be understood by seeing the Chart itself, and having it explained. If understood aright, no master would attempt to teach History without it.

J. S. LAURIE.

JOHN KERR, ESQ., M.A.  
(H.M.'s Inspector of Schools.)

LONDON, Oct. 6th, 1863.

I have examined Mr. Nasmith's Chronometrical Chart with much attention, and have no hesitation in saying that I think it a most important contribution to our educational apparatus, and one which I should be glad to see introduced into every school in which English history is taught. That branch, when managed with merely ordinary skill, is generally uninteresting to the pupil. Geography, on the other hand, can be taught with ease and advantage to a very young class. The Chronometrical Chart, by the method of projection employed in it, goes perhaps as far as possible to supply for the teaching of history those elements which relieve a geography lesson from dulness; viz., colour and locality. The eye and memory are both appealed to, and each fact is accordingly made fast by a couple of links which reciprocally strengthen each other. The isolation, too, which generally characterises historical knowledge, is here remedied by judicious grouping. The plan is extremely simple and intelligible, and most creditable to the author's method and ingenuity. So far as I had time to examine it, the accuracy of detail and the judicious choice of really important facts are such as to make it a most valuable addition, not only to the apparatus of a school, but to the library of the advanced student of history.

JOHN KERR.

J. LANGTON, ESQ., M.A.  
(Head Master, Boys' Model Schools, British and Foreign School Society.)

LONDON, Sept. 26th, 1863.

MY DEAR SIR,—Your excellent Chronometrical Chart has been used in our schools for some months past, and I am glad to be able to bear my testimony to its great practical value. The advantage of your Chart in teaching English history is similar to that of a map in geography; and thus it not only serves to imprint on the mind of the learner a vivid idea of the precise relative position which each event occupies, but also furnishes a means by which an intelligent teacher may present a complete exposition of the causes and consequences of historical occurrences.

I am, my dear Sir, faithfully yours,

J. LANGTON.

# INSTITUT IMPÉRIAL DE FRANCE.

PARIS, le 19 Août, 1863.

LE SECRÉTAIRE PERPÉTUEL DE L'ACADÉMIE.

MONSIEUR,—L'Académie a reçu la Carte Chronométrique de l'histoire d'Angleterre, dont vous lui avez fait hommage. Elle a ordonné que cette carte si ingénieusement conçue et si savamment exécutée serait déposée à la Bibliothèque de l'Institut, et elle m'a chargé de vous transmettre ses remerciements. Veuillez aussi recevoir mes remerciements particuliers pour la copie que vous avez bien voulu m'en adresser, je l'ai parcourue et examinée avec soin. Cet Atlas offre, sous une forme nouvelle, tout ce qu'il y a de plus mémorable et de plus certain dans l'histoire d'Angleterre, depuis son origine jusqu'à nos jours; la distribution

géographique des événements dans les compartiments que vous avez imaginés, avec l'emploi de couleurs diverses et de caractères distincts suivant l'ordre auquel ils appartiennent, permet à l'esprit de les saisir plus nettement et à la mémoire de les retenir plus sûrement. La vue vient en aide à la connaissance ; et les faits historiques de diverse nature, caractérisés avec précision peuvent être mieux suivis dans leur développement progressif et même appréciés dans leurs rapports mutuels. Il serait heureux que cette méthode que vous avez si bien appliquée à l'histoire d'Angleterre, le fût à l'histoire des autres pays.

Agréez, Monsieur, l'assurance de ma considération la plus distinguée.

MIGNET.

H.I.H. PRINCE LOUIS LUCIEN BONAPARTE, F.R.S.

LONDON, *February 28th*, 1863.

DEAR SIR,—I have examined carefully your Chronometrical Chart, and I have been much pleased with it. I think that the idea of using colour is a very good one, and in my opinion the teaching of history will be made by this means much more easy ; nothing, in fact, being capable of calling the attention more than colours, it follows that they prove so useful in impressing the memory with the objects they represent, of whatever kind they may be. I may add that, some years ago, having published a work in which the difference of colours indicated the difference of grammatical forms, these last, so difficult to convey to the minds of others, have been very easily understood, and in some cases learnt by persons unacquainted with the complicate language (the Basque) to which the aforesaid forms belong. So I should be very much surprised if your excellent idea of applying colours to the study of history would not be crowned with deserved success. And believe me, yours very sincerely,

LOUIS LUCIEN BONAPARTE.

M. THIERS.

(Membre de l'Académie Française, Auteur de l'Histoire du Consulat et de l'Empire).

PARIS, *le 25 Avril*, 1863.

MONSIEUR,—J'ai examiné votre travail avec une sérieuse attention. Je suis porté à penser que le mode d'enseignement par Tableaux ou Cartes, appliqué à de simples faits isolés et aux dates, toujours si difficiles à retenir, peut offrir de véritables avantages. Là où le raisonnement ne vient pas en aide à la mémoire, les Tableaux matériels peuvent être d'un grand secours. L'expérience ne tardera pas à nous apprendre si les Cartes, qui ont toujours été employées comme l'auxiliaire le plus propre à seconder l'enseignement de la géographie présentent le même avantage pour l'étude de la chronologie. Vous aurez, en ce cas, Monsieur, rendu à l'art d'instruire, un service dont l'Angleterre ne sera pas seule à profiter, car votre système sera promptement imité dans tous les pays du monde.

Agréez, Monsieur, mes félicitations avec l'assurance de mes sentiments les plus distingués.

A. THIERS.

M. GUIZOT (Membre de l'Institut, etc., etc.)

VAL RICHER (PAR LISIEUX-CALVADOS), 28 *Mai*, 1863.

J'ai reçu, Monsieur, la *Carte Chronométrique de l'histoire d'Angleterre* que vous avez bien voulu m'envoyer, et je vous en aurais remercié plus tôt si je

n'avais tenu d'abord à l'examiner avec quelque soin. Cet examen m'a convaincu que votre ouvrage était remarquablement exact, complet, et résumait très-bien, dans des tableaux clairs, tous les faits essentiels de l'histoire d'Angleterre. Je joins volontiers mon témoignage à ceux qui vous ont déjà été adressés, et je vous prie de recevoir, avec mes remerciements, l'assurance de ma considération très-distinguée.

GUIZOT.

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## THE

# PRACTICAL LINGUIST, ENGLISH.

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"The restless activity of those who interest themselves in the education of the young, loads our tables with productions intended, though not always calculated, to smooth the path of the little learner, and to lessen the labours of those who 'teach the young idea how to shoot.' There is, as a rule, such a sameness in these works that it is a positive relief to find, as in Mr. Nasmith's productions, freshness and originality, as well as practical sagacity, in the carrying out of the object in view. The work before us is well called the 'practical' linguist, for its production would have been impossible to one who had not had considerable experience in tuition. The book is clear, simple, and gradually progressive. The separation of the 'permanent' from the 'auxiliary' vocabulary disburdens the youthful mind, and reduces its labours, as it were, to a minimum.

"The words to be mastered as to their signification and their use are dealt with in proportion to the relative frequency of their recurrence. The same may be said of grammatical forms and rules. Equal importance is not given to all rules. The attention is primarily and chiefly directed to those which are of hourly application. The desirability of this course is sufficiently obvious. In the ordinary speech and writing of the uneducated masses, and we fear we may also say of those who have had some 'schooling' in their youth, the simplest rules—as to the relations between nouns and verbs, for instance—are most

commonly disregarded, while those of a more abstruse description are less frequently violated. No one can examine the work before us—at any rate no one accustomed to grapple with the difficulties of training the youthful mind—without being struck by the tact and care displayed in its preparation. The clearness and simplicity of the system adopted also deserve our hearty commendation. Every work calculated, as this is, to lighten the mere drudgery of the earlier stages of instruction deserves to become widely popular; and such a book only needs to be known to be cordially appreciated by those who have to teach the young, and whose hearts are in the work. We may add also that the typography and general appearance of the book are attractive.”—*Morning Advertiser*, 26th August, 1871.

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“The principle is a sound one, and the care and labour which Mr. Nasmith has bestowed upon the work in carrying out the details, entitle him to the highest praise.”—*Oxford Chronicle*, July 29th, 1871.

“The system is decidedly preferable to any other we have examined, and is equally effectual in either English or German.”—*British Trade Journal*, August 1st, 1871.

“Mr. Nasmith, whose ‘Practical Linguist’ in German we have noticed, has now published Part I. of the English course. It is intended and well adapted for the use of children, and certainly well deserves its title ‘Practical.’ The division of vocabularies into ‘Permanent’ and ‘Auxiliary,’ is perhaps somewhat arbitrary, and will not bear pressing to a hard and fast line; but within bounds it works well, and the little book as a whole will be of much use for early instruction. The anecdotes are well selected both for style and subject.”—*Standard*, August 8th, 1871.

“The author has applied to the English language a principle which he had previously introduced in the teaching of German and other foreign languages. He first ascertains by calculation the comparative frequency with which words are used in ordinary speech or the most common books, and then frames a series of lessons, based upon introducing words according to the frequency of their actual use. The principle appears to be well wrought out, and results in a series of reading lessons, by which it is evident that learners will be gradually familiarised with their difficulties.”—*The Economist*, October 28th, 1871.

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